

USDOL/OALJ Reporter

[\*Graf v. Wackenhut Services, L.L.C.\*](#), 1998-ERA-37 (ALJ Dec. 16, 1999)

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**U.S. Department of Labor**

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**DATE: December 16, 1999**

**CASE NO: 1998-ERA-37**

*In the Matter of*

**MARK A. GRAF,  
Complainant,**

**v.**

**WACKENHUT SERVICES L.L.C.,  
Respondent.**

**APPEARANCES:**

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**BEFORE:**

DANIEL L. STEWART  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER**

This case arises under the Energy Reorganization Act of 1974 (the "ERA" or "Act"), as amended, 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. Pursuant to the Act, employees of licensees of or applicants for a license from the Nuclear Regulatory Commission<sup>1</sup> ("NRC") and their contractors and subcontractors may file "whistleblower" complaints and receive certain redress upon a showing of being subjected to discriminatory action for engaging in a protected activity. See 42 U.S.C. § 5851(a); 29 C.F.R. § 24.2.

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On March 26, 1998, Mark A. Graf ("Complainant") filed a complaint of retaliation against Wackenhut Services L.L.C. ("Respondent"), a subcontractor at the Rocky Flats Environmental Technology Site ("RFETS") in Golden, Colorado. RFETS is run by the Kaiser-Hill L.L.C. for the U.S. Department of Energy ("DOE"). The Occupational Health and Safety Administration, U.S. Department of Labor, conducted an investigation and determined that the complaint had merit. (CX-134.) Respondent appeals the findings and remedies proposed by David W. Decker, Regional Supervisory Investigator, of the Occupational Health and Safety Administration, as set forth in a letter dated June 30, 1998. (See CX-134.)

A formal hearing was held before the undersigned administrative law judge during the week of April 5, 1999, in Denver, Colorado. At the hearing, both parties were represented by counsel and were afforded full opportunity to present evidence and argument. Complainant's Exhibits 1-147 were admitted into evidence, as were Respondent's Exhibits A-M. (Tr. at 12, 16, 724-25, 750, 1186, 1303, 1364, 1389, 1410.)<sup>2</sup> At the conclusion of the hearing, the record was left open for the submission of proposed decisions and orders. (Tr. at 1407-08.) Both parties have timely filed said documents. In addition, counsel for both parties have submitted arguments in response to several post-hearing Orders to Show Cause.

The recommended decision and order contained herein are rendered after thorough review of the hearing transcript, all evidence of record, and the parties' proposed

decisions and orders. All exhibits entered into evidence, although perhaps not specifically discussed herein, have been considered by the undersigned.

**I. BACKGROUND**  
**A. Statement of the Case**

On March 26, 1998, Complainant, Mark A. Graf, filed a complaint with the U.S. Department of Labor alleging that Respondent, Wackenhut Services, L.L.C., took a series of adverse employment actions in 1997 and 1998, in retaliation for engaging in activities protected under the Act. On April 1, 1999, Complainant filed a prehearing brief alleging that Respondent engaged in additional retaliatory actions spanning back to 1995 and 1996.

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Rocky Flats Environmental Technology Site is owned and operated by the U.S. Department of Energy. As a result of a joint decision by Congress and the DOE, RFETS is scheduled to close in approximately 2006. Kaiser-Hill L.L.C. has contracted with the DOE to provide the site management services, including the integration of security and closure procedures. Respondent has subcontracted with Kaiser-Hill to provide site security services. Worldwide Security holds the subcontract for protecting classified information at the site.

In early 1995, Complainant was one of two Central Alarm Station lieutenants that was assigned administrative and operational duties. The other lieutenant was Michael T. Angelo. In this capacity, their primary responsibilities were carried out during a five-day work week. Additionally, they shared the responsibility of providing relief for shift supervisors that were assigned to the twelve-hour shifts. Due to a reduction-in-force, Mr. Angelo was assigned to backfill a shift supervisor vacancy in approximately September 1995. As such, Complainant became the only shift relief lieutenant.

In December 1995, Complainant received additional assignments to perform shift relief work. Complainant contends that he received said assignments in retaliation for writing the letter dated December 8, 1995, to Congressman Skaggs.<sup>3</sup> Complainant also contends that Respondent denied his request to take a one-week block of consecutive "comp time" in January 1996, in retaliation for his protected activity. Respondent counters that the shift assignments were the result of a reduction-in-force. Respondent further argues that the "comp time" request was denied based on corporate policy.

In April 1996, Complainant was assigned to backfill a shift supervisor position. As such, Complainant's participation in meetings and interface with the planning and maintenance departments decreased. Complainant contends that he received the reassignment in retaliation for his protected activity. Respondent argues that the reassignment was the direct result of a vacancy in the shift supervisor staff and the need to backfill the position due to a reduction-in- force.

In response to the letter sent to Congressman Skaggs dated December 8, 1995, DOE officials conducted an investigation into the alleged security violations. In addition, Congressman Skaggs formed an independent review panel to examine safeguard and security measures employed at RFETS. Moreover, Respondent's General Manager, William R. Gillison, solicited and reviewed a classified document prepared by Complainant and Mr. Peters detailing their security concerns. In response, Mr. Gillison directed a team of four managers to investigate the issues raised in said document.

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In the spring of 1996, Complainant participated in a joint investigation conducted by the DOE and the OPM concerning Mr. Peters' whistleblower complaint. Complainant also expressed his site safety concerns to the Defense Nuclear Facilities Safety Board in September 1996 and February 1997. Furthermore, Complainant's concerns were reviewed by the General Downing Committee on behalf of Kaiser-Hill, and the Mollar Group. All of these investigations were completed prior to Complainant's communication with the news media.

In April 1997, Michael M. Cosgrove become Respondent's senior vice president and general manager, replacing Mr. Gillison. At this time, major enhancements were made to security program areas that were considered to be at risk. In May 1997, Complainant was interviewed by a Denver Post reporter about his site safety and security concerns. On May 20, 1997, the Denver Post published an article wherein Complainant and Mr. Cosgrove were quoted. Shortly thereafter, Mr. Cosgrove held a series of "all-hands meetings" in which he explained that all employees were expected to abide by the existing site policies and procedures and that said procedures would be enforced.

In September or October 1997, Complainant met with CBS News representatives concerning site safety and security issues. Complainant disclosed potentially classified information to CBS News representatives and to Mr. Peters. During this time, Mr. Cosgrove was also participating in interviews with CBS News representatives.

On or about October 28, 1997, Mr. Cosgrove became aware of Complainant's participation in the CBS News team investigation when he read a CBS News press release attributing information to Complainant. On November 6, 1997, Mr. Cosgrove asked Complainant to respond to questions concerning his compliance with the classification review policy procedures prior to disclosing information to CBS News. In a written response, Complainant conceded that he had not asked Worldwide Security's Classification Office to perform the requisite classification review. The CBS News report was aired on November 24 and 25, 1997.

In late November or early December 1997, Mr. Cosgrove initiated an administrative investigation into whether Complainant had released classified, sensitive, or proprietary information to the news media. On December 17, 1997, the manager of the Classification Office issued a "White Paper" concerning the freedom of speech. In late January 1998,

Respondent's internal investigators informed Mr. Cosgrove that Complainant had refused to answer questions pertaining to the content of his disclosures. Hence, Mr. Cosgrove held a second meeting with Complainant on January 28, 1998. At this time, Mr. Cosgrove personally requested that Complainant answer the questions and explained that the answers would not be used against him in any type of criminal proceeding. He further explained that Complainant's failure to answer the questions could lead to disciplinary action, including termination. Complainant responded by providing detailed information in writing. In addition, Complainant agreed to voluntarily participate in the Employee Assistance Program.

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On January 31, 1998, Complainant was placed on paid administrative leave pending the results of the psychological evaluation. On February 27, 1998, Respondent received notification that Complainant was fit for duty and suitable for return to work. On March 24, 1998, Mr. Cosgrove met with Complainant to discuss the conditions upon which Complainant would be permitted to work. At that time, Complainant was presented with a Corrective Action Plan and disciplinary letter. Mr. Cosgrove and Complainant were unable to reach an agreement concerning the terms of the Corrective Action Plan. Mr. Cosgrove perceived that Complainant was unwilling to abide by the site classification review procedures, as set forth in DOE Order No. 5650.2B,<sup>4</sup> before engaging in protected activity in the future. Complainant perceived that Mr. Cosgrove was attempting to dissuade him from engaging in protected activities by requiring him to follow the chain of command in the future. As such, Complainant was ordered to remain on administrative leave with pay until further notice.

Complainant contends that Respondent took the above-mentioned actions in retaliation for his communications with CBS News. Respondent argues that these actions were the result of Complainant's knowing violation of DOE Order No. 5650.2B and Complainant's refusal to follow site classification rules in the future.

On or about September 25, 1998, the parties signed a Temporary Return to Work Agreement which enabled Complainant to resume his duties as a shift supervisor. When Complainant returned from paid administrative leave, he observed three cartoons posted on Central Alarm Station bulletin boards. Then, in March 1999, Mr. Angelo received a more favorable supervisory position. Complainant contends that the cartoons were posted, and he was denied the more favorable position, in retaliation for his protected activity. Respondent argues that, as a matter of law, the cartoons do not constitute an adverse employment action. Moreover, Respondent asserts that Mr. Angelo's reassignment was based on valid business reasons.

Complainant seeks relief in the form of reinstatement, back pay, compensatory damages, and attorneys' fees and costs.

### **B. Issues**

Based on the parties' opening statements, as well as their proposed decisions and orders, it is apparent that the following issues require resolution herein:

1. Whether Complainant has proved by a preponderance of the evidence that Respondent retaliated against him for engaging in activities protected by the ERA.
2. If Complainant has proved by a preponderance of the evidence that Respondent's decisions were based, at least in part, on impermissible motives, whether Respondent proved by clear and convincing evidence that it would have taken the same actions in the absence of the protected activity.

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## **II. SUMMARY OF EVIDENCE**

At the formal hearing, Complainant elicited testimony from the following witnesses: William Armijo, Gail L. Bange, Steven L. Cunningham, William R. Gillison, Denise A. Graf, Mark A. Graf, Marcy A. Nicks, Jeffrey B. Peters, David E. Ridenour, and James A. Vissar. In addition, Respondent called the following witnesses: Michael T. Angelo, Michael M. Cosgrove, Ronald Leach, and Bryan Siebert. Respondent also recalled Ms. Bange. Complainant's Exhibits 1-147 and Respondent's Exhibits A-M were also admitted into evidence. The relevant portions of the record are summarized herein.

### **A. Complainant's Testimony**

#### **1. General Employment History at RFETS**

Complainant, Mark A. Graf, began working at RFETS in June 1982, as an employee of Rockwell International ("Rockwell").<sup>5</sup> (Tr. at 555, 651.) Complainant held the position of drafter in the Engineering Department. (Tr. at 555.) In 1989, he was promoted to the position of alarm station supervisor. (Tr. at 555, 651.) Complainant's employment was eventually transferred from Rockwell to EG&G Rocky Flats, Inc. ("EG&G"). (Tr. at 651.) In 1990, Respondent assumed the EG&G security contract and Complainant's employment transferred to Respondent.<sup>6</sup> (Tr. at 651-52.)

In 1995, Complainant was classified as a program manager for the Central Alarm Station ("CAS") operations.<sup>7</sup> (Tr. at 562.) In that capacity, Complainant supervised approximately twenty-eight people and oversaw project management, planning, procurement, maintenance, and human resource interfaces for the CAS. (Tr. at 562-64.) He was assigned to the day shift and usually worked Monday through Friday from 6:00 a.m. to 4:30 p.m. (Tr. at 564.) Complainant was also assigned shift work on a relief basis. (Tr. at 564.) In his capacity as relief lieutenant for the shift supervisors, Complainant allegedly was assigned "what seemed to be an exorbitant amount of overtime" in December 1995. (Tr. at 579.)

At that time, he reported to Captain Ron Leach and the on-duty shift captain. (Tr. at 563-64.) Captain Leach served as Complainant's primary supervisor from 1994 to September 28, 1998.<sup>8</sup> (Tr. at 563.) Following that, and up to and including the present,

Captain Trantanella serves as Complainant's primary supervisor. (Tr. at 563-64.) Captain Leach continues to provide Complainant with program management direction. (Tr. at 563-64.) Complainant testified that his chain of command is as follows: captain, major, colonel, deputy general manager, and general manager. (Tr. at 627.)

In April 1996, Complainant was reassigned from program manager to alarm station supervisor for the "A" day shift. (Tr. at 583.) As alarm station supervisor, Complainant is assigned to a twelve-hour shift from approximately 4:50 a.m. to 6:16 p.m. (Tr. at 584.) Complainant described the twelve-hour continuous shift rotation schedule as follows: "two days on, two days off, two days on, three days off, work weekends and holidays." (Tr. at 584.)

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Complainant is currently employed by Respondent as an alarm station supervisor and earns a salary of approximately \$71,000. (Tr. at 555.)

## 2. Educational Background

Complainant is a high school graduate with approximately one year of college education. (Tr. at 650.) During 1979, 1982 or 1983, and 1989, he attended three different colleges or universities where he enrolled in courses toward a degree in electrical engineering. (Tr. at 650- 51.)

Prior to his employment at RFETS, Complainant was employed at Empire Welding. (Tr. at 650-51.) Complainant has never held a security position outside RFETS and has never been employed at another secured facility. (Tr. at 653-54.)

## 3. Security Training, Clearance, and Certification

Complainant received security training from his employers at RFETS.<sup>9</sup> (Tr. at 652-53.) During this training, he was informed of the policy requiring employees to go through the Classification Office before releasing information to the public. (Tr. at 620.) He also received training from the Association of Public Safety Communications Officers. (Tr. at 653.) Complainant has a "Q" level security clearance and a Personal Security Assurance Program clearance ("PSAP"). (Tr. at 568.)

In April 1992, Complainant was certified as an authorized derivative classifier ("ADC"). (Tr. at 558-59; CX-27.) As an ADC, Complainant is licensed to review information for classification pertaining to the physical security systems and protective force operations. (Tr. at 559.) He described himself as a "subject matter expert." (Tr. at 746.) Complainant received his initial training in 1991, and has received retraining "at least every two years." (Tr. at 655.)



The ADC training and retraining courses were conducted by Steve Cunningham and Janet Nesheim of Worldwide Security. (Tr. at 620, 655-56.) During these training sessions, Complainant has been instructed that an ADC is not authorized to approve information that would be released to the general public. (Tr. at 668-69.) Although Complainant has taken the position that this policy was not being enforced, he did not inquire as to why he was receiving instructions to the contrary. (Tr. at 669.)

Complainant is not a full-time classification officer and has never worked in the Contractor Classification Office or the DOE Classification Office at RFETS. (Tr. at 654.) According to Complainant, he has been consulted by Contractor Classification Office personnel concerning subjects relating to physical security systems. (Tr. at 746.) Nonetheless, Complainant concedes that his classification knowledge is not absolute, and that Mr. Cunningham and Ms. Nesheim have superior knowledge of classification matters as they relate to becoming an ADC. (Tr. at 656.) It is also undisputed that classification rules or "nuances" sometimes change. (Tr. at 654-55.) He relies primarily on written "classification guides" to perform classification reviews. (Tr. at 568.)

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#### 4. Classification Policies and Procedures

##### a. Levels of Restricted Data

Complainant described the different levels of restricted data. (Tr. at 566-69.) "Unclassified controlled nuclear information" ("UCNI") is information that may be shared with noncleared personnel, provided that said personnel understand its dissemination requirements. (Tr. at 566.) "Secret restricted data" may only be shared with persons having "Q" level security clearances. (Tr. at 568.) "Formally restricted data" is predominately weapons design information which Complainant is not authorized to review. (Tr. at 568-69.) "Confidential information" may be accessed by individuals with limited security clearances. (Tr. at 569.) The final category was identified as "national security information." (Tr. at 569.)

#### 5. Classification Review Policy

##### a. EG&G Policy No. 2-9

Complainant identified Respondent's Exhibit B as EG&G Rocky Flats, Inc. Policy No. 2-9, which became effective on September 30, 1992. (Tr. at 658, 661. See also RX-B; CX-40.) Complainant received a copy of this policy during the course of his employment at RFETS, and produced a copy of this policy during the course of discovery in this matter. (Tr. at 658-61.) Complainant was unable to testify about whether said policy had been changed or canceled after Respondent assumed the security subcontract, and conceded that he did not make any inquiries in this regard. (Tr. at 662-64.)



Likewise, Complainant identified Complainant's Exhibit 8 as the EG&G Classification and UCNi Fact Sheet that he produced during discovery. (Tr. at 665-66. See also CX-8.) Complainant testified that, to his knowledge, the policy requiring that "[d]ocuments for [p]ublic [r]elease must be reviewed by the Classification Office staff" has not changed or been canceled. (Tr. at 666. See also CX-8, p. 4.)

*b. Kaiser-Hill Directive CAHW-001-96*

On cross-examination, Complainant was questioned about "Kaiser-Hill Directive CAHW-001-96," which became effective on March 28, 1996. (Tr. at 666. See also CX-80.) This policy applies to information released to persons not employed by Kaiser-Hill or a Kaiser-Hill subcontractor. (Tr. at 667-68.) To his knowledge, this policy has not been changed or canceled. (Tr. at 667-68.) He also understands that this Directive prohibits him from serving in a classification capacity during arbitrations, depositions, and trials. (Tr. at 676.)

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Complainant conceded that CBS News is not part of the "Kaiser-Hill Team" as referenced in this document. (Tr. at 667.) Nonetheless, Complainant testified that he did not see this Directive until after the CBS broadcast. (Tr. at 668.) Nevertheless, Complainant was informed during ADC training that he was not authorized to approve information for public release. (Tr. at 668.)

In 1991, Complainant was under the impression that an ADC could review his own work product for classification. (Tr. at 767.) He reportedly engaged in "numerous self-reviews," including deposition and arbitration testimony discussed hereinafter. (Tr. at 767-68.) According to Complainant, the only written "documents" that he generated, reviewed, and released to the public were the letters to Congressman Skaggs and the letter to the Defense Nuclear Facility Safety Board ("DNFSB"). (Tr. at 768.)

*c. DOE Order No. 5650.2B*

Complainant testified that he was not familiar with the specific terms "Category I," "Category II," and "Category III," as used in DOE Order No. 5650.2B.<sup>10</sup> (Tr. at 568. See also RX-A; CX-20.) Complainant testified that, at the present time, he understands that DOE Order No. 5650.2B prohibits him from serving in a classification capacity at arbitrations, depositions, and trials. (Tr. at 676. See also RX-A; CX.)

*d. Compliance with Classification Policies and Procedures*

Providing security at RFETS is a very important interest and protecting classified information furthers that interest. (Tr. at 652, 677, 683.) Complainant concedes that punishing a person after classified information has been inadvertently released is a rather ineffective means of preventing the dissemination of said information. (Tr. at 683.)

Nevertheless, Complainant disagrees with the policy requiring RFETS employees to go through the Contractor Classification Office before releasing information to the public. (Tr. at 677.) Rather, he believes that this rule should vary depending upon the content of the information and the employee's knowledge of the classification guidelines. (Tr. at 677-78.) For example, he believes that an ADC should be authorized to disclose information to the media without going through the Contractor Classification Office, provided that said information is within the ADC's area of expertise.<sup>11</sup> (Tr. at 679-80.)

*(1) CBS News*

Despite his disagreement with the classification review policy, Complainant denies that said disagreement was a motivating factor in failing to abide by the classification review procedures in effect at the time he met with CBS News. (Tr. at 677.) He further testified that he has never submitted a written document criticizing the RFETS public disclosure policy, other than filing the complaint in the above-entitled action. (Tr. at 652.)

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Complainant concedes that at the time he made disclosures to CBS News, he was aware of the policy requiring employees to go through the Contractor Classification Office before releasing information to the media. (Tr. at 620, 646.) Nonetheless, Complainant did not go through the Classification Office prior to disclosing information to the media. (Tr. at 674.) He defends his actions on the ground that said policy was not being enforced against him. (Tr. at 646.) Complainant testified that he did not make inquiries as to whether the classification review policy was being enforced against others. (Tr. at 648.)

*(2) Congress*

Likewise, Complainant concedes that he was aware of the policy requiring employees to go through the Contractor Classification Office at the time he disclosed information to Congress. (Tr. at 619.) Again, he defends his actions on the ground that said policy was not being enforced against him. (Tr. at 619.)

*(3) Meetings with Mr. Cosgrove*

Complainant conceded that he never told Mr. Cosgrove that the classification review policy had not been enforced against him in the past. (Tr. at 648-49.) Rather, he told Mr. Cosgrove that he believed that he was authorized to approve information for public release in his capacity as an ADC. (Tr. at 648.) He also told Mr. Cosgrove that he refused to go through classification review in the future. (Tr. at 649.)

*e. Depositions and Arbitration*

Complainant testified that his authority to conduct classification reviews of information intended for public release stems from Respondent's practice of sending him to

depositions and arbitrations. (Tr. at 669-70.) He explained that he did not see any difference between testifying at a deposition or arbitration and disclosing information to the media. (Tr. at 674.)

During 1993 to 1995, he attended two depositions and one arbitration. (Tr. at 559-60, 562, 670-76.) According to Complainant, Respondent's managers<sup>12</sup> instructed him to attend the depositions and arbitration for the dual purpose of testifying and ensuring that classified information was not disclosed. (Tr. at 559-62, 656; 670-76.) He was not required to go through the Contractor Classification Office before attending the depositions and arbitration, and no other ADC's were present when he testified. (Tr. at 561, 613.) However, Complainant sought preliminary advice from the Contractor Classification Office before attending the arbitration. (Tr. at 769.) At that time, he was not aware of the policy requiring an ADC to have documents that he creates to be reviewed by another classifier.<sup>13</sup> (Tr. at 614.) He became aware of this policy in March 1998.

Since Mr. Cosgrove assumed the general manager position, Complainant has not been instructed to attend any hearings or trials in his capacity as an ADC. (Tr. at 656.)

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*f. All-Hands Meeting*

In April 1997, Mr. Cosgrove became Respondent's general manager. (Tr. at 657.) Mr. Cosgrove held several "all-hands" meetings in May or June 1997. (Tr. at 656- 57.) Complainant attended an all-hands meeting after the Denver Post article was published on May 20, 1997. (Tr. at 656-57.) At the meeting, Mr. Cosgrove announced that the site rules and procedures were going to be enforced and complied with. (Tr. at 656.) Complainant made no inquiries as to whether the classification review policies were going to be enforced. (Tr. at 657- 58.)

*g. Peters Audiotapes*

Complainant was questioned about Complainant's Exhibit 3, which was identified as an index of the tape recorded conversations that Complainant produced during discovery. (Tr. at 663.) He testified that there appears to be over 100 different conversations on the audiotapes. (Tr. at 664.) There are no tape recorded conversations pertaining to whether Complainant was required to go through the Contractor Classification Office before disclosing information to the media. (Tr. at 665.)

Complainant reviewed Mr. Peters' audiotapes for classification purposes after determining that the Classification Office would not review said tapes. (Tr. at 745-46.) Complainant explained that, in light of the Long & Jaudon letter,<sup>14</sup> Mr. Cunningham indicated that the Contractor Classification Office would not be able to effectuate such a review.<sup>15</sup> (Tr. at 664-65, 745. See also CX- 92.) Hence, Complainant reviewed the

material that was within his subject matter expertise. (Tr. at 746.) Information outside his area of expertise was reviewed by another ADC. (Tr. at 747.)

#### *h. Current Understanding of Classification Review Policy*

As recently as Monday, April 5, 1999, Complainant took the position that he was not required to go through classification before going to the media. (Tr. at 649.) On Wednesday, April 7, 1999, Complainant conceded that the current policy at RFETS requires him to go through the Classification Office before releasing information to the media. (Tr. at 646.) Complainant also concedes that he is currently bound by the policy requiring ADC's to go through the Contractor Classification Office before disclosing information to the media. (Tr. at 646, 658.) Nonetheless, Complainant declined to state whether he will abide by this policy because he has questions about how to facilitate a review of information that is intended for joint release by Mr. Peters and himself. (Tr. at 647, 650.) He stated that he would need assistance in solving this problem. (Tr. at 647.)

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For example, he recently sought classification review of information that he intended to disclose to the public. (Tr. at 647.) According to Complainant, he was informed that an accurate classification review could only be performed by reviewing the entire package of information that he intended to disclose. (Tr. at 647.) Since he intended to combine his information with information in Mr. Peters possession, such a review was not possible. (Tr. at 647.)

#### *6. Security Concerns*

In 1995, Complainant became concerned about security and safety issues at RFETS. (Tr. at 565.) He recounted a 1995 incident in which a guard was removed from a classified storage area that contained an unprotected trailer. (Tr. at 565, 569.) The trailer was later discovered to contain "secret restricted data." (Tr. at 565, 569.) Complainant reported this incident to Collis Woods, manager of investigations, and Barbara Brant, a senior investigator. (Tr. at 566.) Mr. Woods and Ms. Brant determined that an investigation would not be necessary. (Tr. at 566.) Complainant disagreed with their assessment. (Tr. at 566.)

Complainant also recounted an incident in which special nuclear materials were temporarily stored in a "soft room" as opposed to a vault-type room. (Tr. at 570- 72.) He was instructed to install a radio based alarm system inside the soft room. (Tr. at 570, 572.) In his opinion, a radio based alarm system would provide inadequate protection because such a system could be manipulated.<sup>16</sup> (Tr. at 571-72.) Complainant suggested several alternatives which were ultimately denied. (Tr. at 570.) After completing the alarm system installation, Complainant discussed his concerns with Marty Anderson, manager of planning, and either Jim Gilmer or Bill Gillison at a weekly meeting on issues

resolution. (Tr. at 573.) Nevertheless, Complainant's concerns were not alleviated. (Tr. at 573.) The material was eventually moved back to a vault-type room. (Tr. at 573.)

#### 7. Letters to Congressman Skaggs

After the material was moved back to the vault-type room, Mr. Peters asked Complainant for his assistance in writing a letter to Congressman Skaggs concerning security issues and vulnerabilities at RFETS. (Tr. at 573-74.) Complainant agreed to do so. (Tr. at 573.) Some time later, Mr. Peters asked Complainant for his assistance in writing a second letter to Congressman Skaggs. (Tr. at 573-75.)

Complainant's Exhibit 72 was identified as a copy of the second letter to Congressman Skaggs. (Tr. at 574.) Complainant typed the second letter at his home and reviewed it for classification purposes.<sup>17</sup> (Tr. at 574- 76.) Although some of the information contained in this letter was gathered from employees assigned to the protective force, Complainant did not recall either Mr. Angelo or Ms. Usselman providing said information. (Tr. at 576-76.) Complainant did not ask the Classification Office to review these letters because he did not think that he was required to do so. (Tr. at 615.)

On December 13, 1995, a computer security representative of Worldwide Security was sent to Complainant's home to permanently remove the second letter from his home computer. (Tr. at 576-77.) Worldwide Security also took possession of the printer ribbon which Complainant had stored in a RFETS safe. (Tr. at 577.) These security precautions were after Complainant told the representative that the letter was not classified. (Tr. at 577.)

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Approximately two weeks later, DOE employee Ron Hoffman provided Complainant with a copy of a memorandum from Brian Siebert to Ed McCallum.<sup>18</sup> (Tr. at 578; CX-73.) This memorandum stated that the letter to Congressman Skaggs dated December 8, 1995, was determined to be unclassified. (Tr. at 578; CX-73.) Mr. Hoffman said, "If you ever go to Congress, feel free to give us a call." (Tr. at 615.) Complainant testified that he did not interpret this remark as an order requiring him to go through the Classification Office. (Tr. at 616.)

In June 1996, Complainant had a conversation with Mr. Gillison about the letters to Congressman Skaggs. (Tr. at 589-90.) After Complainant told Mr. Gillison that he stood by the content of the letters, Mr. Gillison said that he did not have a problem with Complainant blowing the whistle and that he was also a whistleblower. (Tr. at 590.) Moreover, Mr. Gillison explained that there were conditions at RFETS that did not allow Respondent to fix the problems. (Tr. at 590.) Complainant interpreted the term "conditions" to mean the "political environment." (Tr. at 590.) At that time, Complainant told Mr. Gillison that he was disappointed that he had been assigned shift work. (Tr. at 591.)

#### 8. Classified Letter to Mr. Gillison

On or about February 5, 1996, Complainant and Mr. Peters composed an eight page classified letter to Mr. Gillison detailing their site security concerns. (Tr. at 594.) This was done at Mr. Gillison's request. (Tr. at 594.) Complainant typed the letter on the classified computer system, sent it to his safe, and advised Mr. Gillison that it was available for his review. (Tr. at 594.) The letter is classified and is not part of the record. (Tr. at 593-94.)

#### 9. Investigations Re: Security Concerns

Complainant's security concerns were reviewed by the DOE, by the Mollar Group, by the General Downing Committee on behalf of Kaiser-Hill, by a committee created by Congressman Skaggs, and by a blue ribbon panel of Respondent's employees. (Tr. at 604-05, 684, 731-39.) These investigations were completed prior to Complainant's communication with the media in 1997. (Tr. at 604-05, 684, 731-39.)

##### a. DOE Investigation

Don Solich and Ed Seymanski conducted an investigation into the security concerns raised in the letters to Congressman Skaggs. (Tr. at 592, 731.) Mr. Solich and Mr. Szymanski found that Mr. Peters' concerns were either unsubstantiated, not considered to be a risk, or had already been addressed. (Tr. at 684.)

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Complainant was "very disappointed" with this conclusion. (Tr. at 592, 731.) He opined that an accurate investigation had not been conducted and that he was never contacted by Mr. Solich or Mr. Szymanski. (Tr. at 592, 722, 731.) While he does not think they were obligated to interview him, he was told that several people had suggested that they contact him. (Tr. at 732.) Even though Complainant did not agree with all of the conclusions contained in the report, he never submitted any written comments or criticisms. (Tr. at 731.) He believed that such activity would be "ineffective." (Tr. at 731-32.)

##### b. Mohler Group

The "Mohler Group" also reviewed the security at RFETS. (Tr. at 732-33.) Complainant was aware of the Mohler Group, but he did not submit any documents or criticisms about site security to the Group. (Tr. at 733.)

##### c. General Downing Committee

General Downing also presided over a committee that reviewed security concerns at RFETS. (Tr. at 734.) Complainant requested an interview with the Downing

Committee,<sup>19</sup> but he was not afforded this opportunity. (Tr. at 734.) He denied being angry that the Committee had failed to contact him. (Tr. at 735.) Instead, he said that he was "disappointed."<sup>20</sup> (Tr. at 735.)

Complainant does not agree with all of the comments contained in the Downing Committee report. (Tr. at 734-35.) He explained that the report does not fully embrace his security concerns. (Tr. at 735.) Nevertheless, he did not submit any written documents or criticisms about site security to this committee. (Tr. at 734.)

*d. Skaggs Committee*

An investigation into site security was also conducted by the "Skaggs Committee."<sup>21</sup> (Tr. at 737-38.) Complainant does not agree with all of the conclusions and recommendations contained in the Committee reports.<sup>22</sup> (Tr. at 739. See also RX-F.) He also explained that the reports did not address all of his site security concerns. (Tr. at 739.)

*e. Blue Ribbon Panel*

Finally, a "Blue Ribbon Panel" conducted an investigation. (Tr. at 604-05.) Complainant testified that he reviewed their report and was disappointed that the panel had not interviewed him. (Tr. at 605.)

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*10. Overtime Assignments*

In December 1995, Complainant was the only relief lieutenant for the shift supervisors. (Tr. at 579.) According to Complainant, he was assigned to work an "exorbitant amount" of overtime.<sup>23</sup> (Tr. at 579.) He claims to have worked over 260 shift hours. (Tr. at 580.) Although Complainant conceded that he did not keep track of the number of hours that the other officers worked, he opined that he worked 90 to 100 hours more than the other officers worked in December 1995. (Tr. at 581-82.) The overtime requirements effected his holiday that year. (Tr. at 580.)

Overtime assignments were made by Captain Leach, Captain Trantanella, Captain Shields, and Captain Brooks. (Tr. at 693.) Complainant was ordered to fill the shift assignments by Captain Leach, his direct supervisor, and Joe Walsh, his manager. (Tr. at 693-94.) Complainant opined that Captain Leach and Mr. Walsh worked in concert to retaliate against him for writing the letter(s) to Congressman Skaggs. (Tr. at 694.)

He asked his manager for assistance in filling the shift assignments. (Tr. at 579-80, 694.) Mr. Walsh and a representative from the Human Resources Department met with Complainant to discuss the assignments. (Tr. at 694.) He was informed that no assistance was available because of holiday and vacation schedules. (Tr. at 579-80.) Mr. Walsh also



stated that he was not being treated differently than any of the other employees. (Tr. at 580.) Complainant testified that he did not feel that the meeting had resolved the overtime issue, however, he conceded that he never raised the issue again with the Human Resources Department. (Tr. at 694-95.) He did not receive overtime compensation for this work because he was a salaried employee. (Tr. at 580- 81.)

Complainant stated that the following individuals were qualified to work overtime: Mr. Walsh, his manager; Ron Leach, his captain; Mr. Angelo; Mr. Couper; Mr. Cseh; Mr. Pomeroy; and possibly Mr. Chamberlin. (Tr. at 579-80, 701.) However, Mr. Couper was on vacation during the month of December. (Tr. at 580.)

In January 1996, Complainant took one week of vacation time. (Tr. at 582; RX-M.) He had intended to take a block of "comp time." (Tr. at 830.) However, he was later informed by Gary Sayers that the compensation policy disallowed blocks of "comp time." (Tr. at 830.) According to Complainant, Mr. Walsh could have approved his "comp time" request. (Tr. at 830.) He complained to a Human Resource Department representative about this policy. (Tr. at 697.)

Around this time, the Physical Security Systems Working Group was disbanded and Complainant was assigned to fewer meetings. (Tr. at 582.)

### *11. New Assignment*

In April 1996, Complainant was assigned to the alarm station shift supervisor position for the "A" day shift. (Tr. at 583, 709-10.) As an alarm station supervisor, Complainant is assigned to a twelve-hour shift from approximately 4:50 a.m. to 6:16 p.m. (Tr. at 584.) According to Complainant, Mr. Walsh said that the reassignment was made in anticipation of a reduction-in-force. (Tr. at 583, 710.) Complainant's duties were reassigned to Captain Leach, with assistance from the shift lieutenants. (Tr. at 710-11.) Although this was the process that would normally be followed in a reduction-in-force situation, Complainant opined that he was not reassigned for that purpose. (Tr. at 710.)

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The reassignment impaired his ability to interface with the planning and maintenance operations. (Tr. at 585-87.) He was no longer responsible for the armory operation. (Tr. at 587.) However, he was still instructed to write some technical papers. (Tr. at 587.)

His participation in meetings also decreased. (Tr. at 582, 827.) Complainant had previously participated in alarm system replacement meetings. (Tr. at 827.) According to Complainant, he was initially told to continue attending the meetings. (Tr. at 712.) Later, Mr. Walsh allegedly told Complainant not to attend the meetings because the Kaiser-Hill representatives did not want him there.<sup>24</sup> (Tr. at 712, 827.)

### *12. DOE/OPM Investigation*

In February 1996, DOE Employee Concerns Manager Marcy Nicks was investigating Mr. Peters' whistleblower allegations. (Tr. at 696-97.) Ms. Nicks interviewed Complainant. (Tr. at 696-97.) He complained to Ms. Nicks about the excessive overtime hours and the shift supervisor assignment. (Tr. at 696-97, 713.)

Ms. Nicks and her partner, Linda Weghorst, interviewed Complainant and accurately summarized his statements in an investigative report pertaining to Mr. Peters' whistleblower complaint. (Tr. at 696, 713, 821-22; CX-86 at MG518.) The investigative report addresses, among other things, Complainant's reassignment in April 1996 and overtime assignments in December 1995. (Tr. at 821-823. See also CX-86 at MG0518.) According to Complainant, Mr. Walsh said that he would eventually be reassigned to the day shift. (Tr. at 822.) Complainant did not complain to the Kaiser-Hill employee resolution person. (Tr. at 697.)

### *13. Defense Nuclear Facility Safety Board*

In September 1996, Complainant contacted the Defense Nuclear Facility Safety Board ("DNFSB") concerning site safety issues. (Tr. at 591-93, 619.) In February 1997, Complainant met with members of the DNFSB. (Tr. at 740-41.) Complainant drafted an unclassified letter and held an unclassified briefing at his home. (Tr. at 593, 619.) He also took the individuals holding "Q" clearances onto the site "to show them a few issues." (Tr. at 593, 619.) Complainant did not ask the Classification Office to review his letter, and he "didn't hear anything negative." (Tr. at 615-16.)

Later, a DNFSB representative informed him that the 1998 Defense Authorization Bill contained a section establishing an independent board to review security concerns at DOE nuclear facilities. (Tr. at 629, 740.) The representative also offered his congratulations. (Tr. at 629, 740.)

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### *14. Congressional Aides*

In 1996 or 1997, Complainant discussed his site security concerns with staff members from the offices of Senator Allard and Congressman Skaggs. (Tr. at 595.) According to Complainant, the congressional aides indicated that their offices "probably would not do a whole lot until public opinion was swayed."<sup>25</sup> (Tr. at 596.) In addition, the chairman of the Colorado Republican Party encouraged Complainant and Mr. Peters to contact the media. (Tr. at 596.)

During cross-examination, Complainant was questioned about an audiotape containing a conversation with David Abelson, a staff member to Congressman Skaggs.<sup>26</sup> (Tr. at 724-30. See RX-I, J.) At one point in the conversation, Mr. Abelson cautioned Complainant to protect himself from potential retaliation. (RX-I at 16.) Complainant responded,

Fair thing to think about, but, I think the only avenue is to make as big a pop as you can and hopefully somebody will see the flare and rush to your aid. If they don't rush to your aid - they realize - they get what they pay for.

(Tr. at 729-30. See also RX-I at 17.) Complainant testified that when he contacted CBS News, he was hoping to make "as big a pop" as possible. (Tr. at 730.)

On redirect, Complainant was asked about the following excerpt:

Mark Graf: But we also want you to - you know, there - there's a feeling - Jeff is gone - long gone, now

David Adelson: Yep.

Mark Graf: at Rocky Flats - uh - I

David Adelson: Jeff would have been gone anyway -

Mark Graf: Yeah - maybe

David Adelson: by the time he approached us.

Mark Graf: Yeah. The - the - uh

David Adelson: I mean, the letter sealed his fate.

(Tr. at 766. See also RX-I at 5.) Complainant testified that Mr. Adelson was referring to the letter sent to Congressman Skaggs. (Tr. at 766.)

#### *15. Document Review for Mr. Peters*

Mr. Peters asked Complainant to review documents and audiotapes for classification purposes before disclosing them to a court in another matter. (Tr. at 597.) Complainant suggested that Mr. Peters contact the Classification Office for assistance. (Tr. at 597.) Later, Mr. Peters told him that the Classification Office had refused to review his material. (Tr. at 597.) At that time, Mr. Peters showed Complainant a letter from Long & Jaudon. (Tr. at 597. See also CX-92.) The letter was identified as Complainant's Exhibit 92. (Tr. at 597. See also CX-92.) Complainant "thought it was ludicrous" for the Classification Office to refuse to assist Mr. Peters.<sup>27</sup> (Tr. at 598.) In his opinion, Mr. Peters "was being set up" because he was not qualified to make classification determinations. (Tr. at 600.)

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Complainant reviewed the documents and audiotapes for classification purposes. (Tr. at 600-01.) After he had reviewed the material, Complainant contacted Steve Cunningham and received marking guidance. (Tr. at 602.) Mr. Cunningham explained that there was an ownership issue which precluded the Classification Office conducting the review. (Tr. at 602-04.)

The Long & Jaudon letter presented Complainant with philosophical and technical problems. (Tr. at 742. See also CX-92.) He explained that even though the Classification

Office was willing to review his material, such a review would be incomplete when he combined his material with Mr. Peters' material. (Tr. at 743-44.) Complainant said that he provided Mr. Cosgrove with a copy of the Long & Jaudon letter "on the day of [his] discipline". (Tr. at 744-45. See also CX-92.)

*16. Ridenour Resignation Letter*

In May 1997, Ed McCallum called Mr. Peters to inquire about David Ridenour's resignation letter. (Tr. at 606.) Complainant testified that he had listened to a tape recorded conversation between Mr. Peters and Mr. McCallum, and that it had given him a sense of urgency. (Tr. at 761-63.)

*17. Denver Post Article*

In 1997, Complainant and Mr. Peters were interviewed by a reporter with the Denver Post. (Tr. at 606-08.) Complainant discussed his site security concerns and served as a classifier for Mr. Peters and himself.<sup>28</sup> (Tr. at 607-08; 621-22.) Complainant testified that he did not release any classified or UNCI information to the Denver Post reporter.<sup>29</sup> (Tr. at 618.) He was unable to recall whether he contacted the Classification Office before he participated in the Denver Post interview. (Tr. at 613.)

In April 1997, Michael M. Cosgrove became Respondent's senior vice president and general manager. (Tr. at 616, 657.) On May 20, 1997, the Denver Post published an article about RFETS wherein Complainant was quoted. (Tr. at 606, 608. See also CX-97.) Complainant was not disciplined for his involvement with the Denver Post. (Tr. at 616-17.) Complainant further testified that he did not receive any oral warnings pertaining to the classification review policy. (Tr. at 616-17.)

Shortly after the Denver Post article was published, Complainant was teased by his fellow security police officers about being a hero. (Tr. at 610.)

*18. CBS Evening News*

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In September or October 1997, Complainant and Mr. Peters had several meetings with representatives from CBS Evening News. (Tr. at 620-21, 624, 683.) Complainant agreed to accompany Mr. Peters to these meetings to discuss his site security concerns and to serve as a classifier for Mr. Peters and himself. (Tr. at 621.) He had been encouraged by "our congressional representative and Ed McCallum" to garner media attention. (Tr. at 683-84.)

Complainant was aware that the representatives from CBS News did not have security clearances. (Tr. at 683.) Nevertheless, Complainant did not go through the Classification Office prior to disclosing information to the CBS News correspondents. (Tr. at 674.) He

defended his actions on the ground that the classification review policy was not being enforced against him. (Tr. at 646.)

According to Complainant, he made general statements about various security flaws at RFETS.<sup>30</sup> (Tr. at 683.) He further testified that he did not release any classified or UCNI information. (Tr. at 623, 625.)

On October 28, 1997, CBS News issued a press release which was identified as Complainant's Exhibit 109. (Tr. at 625; CX-109.) Complainant testified that the comments attributed to him in the press release were accurately expressed. (Tr. at 625, 626. See also CX-109.) He does not believe that the press release contained any classified or UCNI information. (Tr. at 625.)

On November 6, 1997, Mr. Cosgrove gave Complainant a letter which was identified as Complainant's Exhibit 111. (Tr. at 626.) Gail Bange was also present at this meeting. (Tr. at 626.) Complainant was asked to respond to the questions set forth in the letter. (Tr. at 627. See also CX-111.) He submitted a written response which was identified as Complainant's Exhibit 110. (Tr. at 627.)

*a. Internal Investigation*

Complainant agreed that Mr. Cosgrove was responsible for determining whether Respondent's employees disclosed inappropriate information to the media. (Tr. at 687-88.) Nevertheless, Complainant initially refused to provide Respondent with detailed information about his disclosures to CBS News. (Tr. at 689. See also CX-118.) Complainant explained that Mike Singer of CBS News had led him to believe that anything that he told CBS News would be "protected information." (Tr. at 689.)

Complainant identified Exhibit 119 as the Investigations Report prepared by Tom Horton and Stephanie Davis. (Tr. at 690; CX-119.) Complainant testified that the Investigations Report accurately attributes the following statements to him:

Graf stated he is aware of the DOE Procedure requiring approval from the Classification Office prior to releasing information to the public or media. . . .  
Graf stated he would not answer two of the questions presented to him during the [Wackenhut] interview.

. . . .  
[Graf] ensured nothing was classified, and stated as an Authorized Derivative Classifier (ADC) and a Subject Matter Expert (SME), he is the most qualified to determine if classified material was discussed.

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(Tr. at 690-92. See also CX-119.) Complainant thought that he was the most qualified person to perform the classification reviews because he was a subject matter expert ("SME"). (Tr. at 692.) However, Complainant conceded that RFETS should not have a

policy that allows each ADC to determine whether he believes that he is the most qualified person in the subject matter. (Tr. at 692.)

Complainant also stated that he did not think that his conduct constituted a violation of DOE procedure, and that the following statement was an inaccurate representation of his remarks:

Graf stated no classification information was discussed and offered three reasons why he knowingly violated the procedure.

(Tr. at 690 (emphasis added). See also CX-119, 118.) When Complainant met with CBS News, he thought that he was authorized to disclose information to the media without going through the Classification Office because he was an ADC. (Tr. at 688.) He conceded that he never claimed to be asserting "the personal opinion exception" to the classification review policy. (Tr. at 688.) He was unable to recall whether or not he told Mr. Cosgrove that he thought that an exception to the classification review policy had been created because he had been sent to depositions in the past. (Tr. at 688.)

*b. Employee Assistance Program*

Complainant told Mr. Cosgrove that he was having difficulty sleeping because of his site safety and security concerns. (Tr. at 721.) He also showed a picture of his children to Mr. Cosgrove and expressed concerns about the safety of his children. (Tr. at 721.) Complainant conceded telling Mr. Cosgrove that, "If I were you, I might refer me to EAP." (Tr. at 721.) He further stated that, as a supervisor, he might have ordered a person like himself to participate in the EAP. (Tr. at 720-21.)

Mr. Cosgrove requested that Complainant voluntarily report to the Employee Assistance Program ("EAP") for an evaluation.<sup>31</sup> (Tr. at 720.) He has not observed any differences in the career paths of employees that have been ordered to involuntarily participate in the EAP. (Tr. at 720.)

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*c. Chain of Command*

On direct examination, Complainant was asked about the following language contained in Complainant's Exhibit 125:

I expect you to adhere to the chain of command in all issues that pertain to this company and the security of this site.

(Tr. at 627. See also CX-125.) Complainant understood this statement to mean that he could not engage in whistleblower activities unless he had previously discussed his concerns with the individuals in his chain of command. (Tr. at 627.) He thought this was

an unacceptable limitation because "[i]n some cases, the time for the chain of command to react [would] take longer than the threat would allow." (Tr. at 629.)

Complainant described his chain of command as follows: captain, major, colonel, deputy general manager, and general manager. (Tr. at 627.)

*d. Return to Work Agreement*

Ms. Bange asked Complainant if he would be willing to sign a return-to-work agreement. (Tr. at 628.) He said that he would be willing to sign an agreement provided that an additional statement, which he faxed to her, was incorporated into such an agreement. (Tr. at 628.) Ms. Bange later told Complainant that his proposed revision was unacceptable to Mr. Cosgrove, and, as such, that he would remain on paid administrative leave. (Tr. at 628.)

On September 28, 1998, Complainant returned from paid administrative leave. (Tr. at 632.) Complainant had been on paid administrative leave for eight months. (Tr. at 718.)

*19. Cartoons*

Upon returning from administrative leave, Complainant observed three cartoons on bulletin boards that appeared to be referring to him. (Tr. at 610, 612.) The cartoons were identified as Complainant's Exhibit 10. (Tr. at 610.) He does not know who posted the cartoons or how long they were displayed.<sup>32</sup> (Tr. at 716-17.) Complainant removed the cartoons but did not report this incident to Respondent. (Tr. at 717-18.)

A cartoon with a person's head in the ground was posted inside the Central Alarm Station ("CAS"). (Tr. at 611, 716. See CX-10.) The word "Kleo" appeared on the cartoon and apparently referred to Kleo Pomeroy, one of the night shift lieutenants. (Tr. at 612.) Complainant said, "Some of my people were extremely happy I was back, although they thought that one of my lieutenants had his head in the sand about it." (Tr. at 611.) He considered this to be a negative incident. (Tr. at 612.)

A Drabble cartoon was posted on the bulletin board located in the hallway of Building 121. (Tr. at 612, 717.) Building 121 contains the protective force shift change facilities, locker facilities, armory, lieutenants' quarters, CAS and secondary alarm station. (Tr. at 612.) Protective force management is not located in this building. (Tr. at 612.)

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A Ziggy cartoon was attached to the same page as the Drabble cartoon. (Tr. at 612-13; CX-10.) He thought that this cartoon referred to him because it was attached to the same page as the Drabble cartoon. (Tr. at 613.) He felt that "individuals were trying to be lighthearted about a very serious topic." (Tr. at 613.) Complainant testified that alarm



station supervisors and some management personnel frequented these areas.<sup>33</sup> (Tr. at 829.)

#### 20. White Paper

During discovery, Respondent produced a "white paper" dated December 17, 1997. Complainant was not aware of this policy or any similar policies concerning First Amendment rights prior to May 1997. (Tr. at 618.) Complainant conceded that the "white paper" was created after the CBS News broadcast. (Tr. at 689.)

#### 21. Retaliation by Kaiser-Hill and DOE

During direct examination, Complainant expressed his distrust for Respondent, Kaiser-Hill, and the DOE. (Tr. at 639-40.) He further opined that Kaiser-Hill and the DOE were instigating the retaliation alleged herein. (Tr. at 706.) According to Complainant, Mr. Cosgrove had a breakfast meeting with Kaiser-Hill and DOE representatives prior to taking retaliatory action against him. (Tr. at 825.) He further asserted that the DOE participated in the decision as to whether to litigate this matter. (Tr. at 825.)

On cross-examination, Complainant conceded that neither Kaiser-Hill nor the DOE attended Mr. Cosgrove's meetings. (Tr. at 707.) He further testified that Mr. Cosgrove did not call the Kaiser-Hill or DOE representatives when Complainant refused to disclose what he had told CBS News. (Tr. at 708.)

#### 22. Mr. Angelo

Complainant supervised Mr. Angelo from 1989 to approximately 1994, and then again from late 1995 to April 1996. (Tr. at 709-10.) In January, February, and March 1996, Mr. Angelo held a shift supervisor position. (Tr. at 709.) Complainant testified that Mr. Jamsay<sup>34</sup> "promoted" Mr. Angelo from a shift supervisor position to Complainant's former program management position. (Tr. at 714.) Consequently, Complainant became less involved in the technical end of the work. (Tr. at 588.)

#### 23. Salary

Complainant testified that his \$71,000 salary has not been affected during the alleged period of discrimination. (Tr. at 699.) He has received raises and several letters of commendation during the course of his employment. (Tr. at 699-700; 703-04. See, e.g., CX-2.)

#### 24. Relief Requested

Complainant requests that Respondent reinstate him to a program management position. (Tr. at 634, 708.) He testified that Mr. Angelo currently holds the position. (Tr. at 634, 708.) In the alternative, he would like to receive training and education in another field. (Tr. at 640-41.) Complainant reasoned that "there are no opportunities in the security field that pay a comparable salary." (Tr. at 640.) Complainant would also like other employees to know that they can disclose information without fear of reprisal.<sup>35</sup> (Tr. at 634.)

Complainant also seeks emotional distress damages. (Tr. at 635-38, 719.) He stated that his stress level has increased and his temperament has been effected. (Tr. at 635-636.) He explained that "he is a little snappier." (Tr. at 636.) His sleep pattern has also changed. (Tr. at 637-38.) Since December 1995, Complainant has been sleeping three to four less hours each night. (Tr. at 637-38.)

Complainant is married and has three children.<sup>36</sup> (Tr. at 622.) In many ways his family relationships have been strengthened through this process. (Tr. at 635.) Nonetheless, the litigation process has been time consuming and has caused him to miss some social events. (Tr. at 636.) On cross-examination, however, he testified to taking three trips outside of Colorado while he was on paid administrative leave. (Tr. at 719.)

At the time of the CBS interview, he was concerned about losing his job. (Tr. at 622.) Nevertheless, his wife was supportive of his decision to discuss his concerns with the media. (Tr. at 622.)

### **B. Testimony of William Armijo**

Since 1987, William Armijo has been employed as an armed security police officer at RFETS. (Tr. at 173-74, 197.) During this time, Mr. Armijo has been employed by several different contractors. (Tr. at 197.) He was originally hired by Rockwell in 1987. (Tr. at 197.) Then, in 1990, Mr. Armijo was hired by EG&G when it assumed the management responsibilities for RFETS. (Tr. at 197.) Finally, Mr. Armijo was hired by Respondent when it was awarded the security services contract in late 1990. (Tr. at 197.) He has been employed by Respondent for over seven years and currently earns a \$52,000 salary.<sup>37</sup> (Tr. at 197, 199.)

During the course of his employment at RFETS, Mr. Armijo has been subject to disciplinary action. (Tr. at 196.) According to Mr. Armijo, Respondent took adverse employment actions against him after he participated in whistleblower activities. (Tr. at 174-75, 178-86, 189, 197.)

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In 1991, Mr. Armijo responded to an alarm that had been activated in a "material access area" where special nuclear materials are stored. (Tr. at 176.) He was unable to access the material access area without passing through a contaminated area. (Tr. at 176- 77.) Mr.

Armijo testified that he had been trained not to enter contaminated areas without the proper safety equipment. (Tr. at 175-76.) After determining that the proper safety equipment was unavailable, he contacted his supervisor.<sup>38</sup> (Tr. at 176-77.) His supervisor allegedly instructed him to access the contaminated area and respond to the alarm. (Tr. at 176-77.)

Nonetheless, EG&G issued a radiation deficiency report reprimanding Mr. Armijo for failing to comply with its safety procedures. (Tr. at 177.) Mr. Armijo testified that he received a two-week suspension for questioning a supervisor's order and entering a radiation control area without the proper equipment. (Tr. at 179.) He identified Complainant's Exhibit 18 as a copy of the disciplinary suspension letter.<sup>39</sup> (Tr. at 179.)

After returning to RFETS, Mr. Armijo continued to voice complaints about the above-mentioned incident. (Tr. at 180.) For example, Mr. Armijo outlined his concerns in a document which Complainant's counsel introduced into evidence as Exhibit 19. (Tr. at 179.)

Mr. Armijo also testified that he was a trustee and safety representative for the union. (Tr. at 179.) In his capacity as safety representative, he was responsible for notifying management of any safety concerns that arose during his shift. (Tr. at 179.) He held this appointed position from 1988 to 1998. (Tr. at 199.)

On cross-examination, Mr. Armijo testified that he made numerous safety complaints.<sup>40</sup> (Tr. at 199-202.) Moreover, Mr. Armijo submitted two doctor's notes complaining about his issued uniform. (Tr. at 204.) Mr. Armijo further testified that he filed two workers' compensation claims during the course of his employment at RFETS.<sup>41</sup> (Tr. at 203-04.)

In 1992, Respondent terminated Mr. Armijo and revoked his security clearance.<sup>42</sup> (Tr. at 180, 182; CX-23.) Mr. Armijo subsequently filed a whistleblower complaint,<sup>43</sup> and was reinstated after an investigative report was issued by the Office of Contract Employee Protection, DOE. (Tr. at 180-82; CX-47, 24.)

When Mr. Armijo's termination was rescinded, Respondent treated him as a new employee for the purposes of reissuing his security clearance. (Tr. at 182, 186.) At the direction of Bill Gillison, Respondent's new general manager, a full background investigation was initiated. (Tr. at 182, 207-08.) During the course of the investigation, some potentially derogatory information about Complainant was documented. (Tr. at 186, 206-07.) For example, Mr. Armijo's neighbors alleged that he had stolen Respondent's property and was selling said property at garage sales. (Tr. at 206-07.)

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It was later determined that a full background investigation was not necessary. (Tr. at 205.) Approximately eighteen months elapsed before Mr. Armijo's security clearance was reissued. (Tr. at 188-89.) In this interim period, Mr. Armijo worked as an unarmed

security guard. (Tr. at 189.) Ultimately, Mr. Armijo received a satisfactory settlement of his whistleblower grievance. (Tr. at 190.)

Mr. Armijo further testified that Jim Vissar and Phil Cruz contacted the media about security-related issues at RFETS. (Tr. at 191.) According to Mr. Armijo, neither Mr. Vissar nor Mr. Cruz contacted the Classification Office prior to making their disclosures. (Tr. at 193-93.)

Mr. Cruz contacted the media in his former capacity as union vice president. (Tr. at 192.) Later, when Mr. Armijo asked Mr. Cruz whether he had gone to the Classification Office before contacting the media, Mr. Cruz denied contacting the Classification Office. (Tr. at 192.)

In 1994, Mr. Vissar contacted the media in his capacity as union president. (Tr. at 193.) Mr. Vissar voiced his concerns about site safety and security during a union strike.<sup>44</sup> (Tr. at 194.) Mr. Armijo was present when Mr. Vissar contacted with the media, and testified that he did not observe Mr. Vissar seeking classification review prior to conversing with the media. (Tr. at 193.)

### **C. Testimony of Gail L. Bange**

Ms. Bange began working at RFETS in October 1977. (Tr. at 923.) She was employed by Rockwell International as a clerk typist. (Tr. at 924.) She was also employed by EG&G in a human resource capacity. (Tr. at 924.) In December 1992, Gail L. Bange began working as Respondent's director of human resources.<sup>45</sup> (Tr. at 880-81.) Her current job title is director of administrative services. (Tr. at 881.) Ms. Bange has a bachelor's degree in business management and a master's degree in management. (Tr. at 923.)

#### **1. Personnel Policies**

Complainant's Exhibit 17 was identified as the administrative discipline policy that was in effect from approximately 1991 to 1995. (Tr. at 870.) Complainant's Exhibit 65 was identified as the administrative discipline policy that replaced the policy identified as Complainant's Exhibit 17. (Tr. at 871.) This policy applied to all employees from March 1995 to November 1997.<sup>46</sup>

In November 1997, Respondent adopted the "Kaiser Hill Team Standards of Conduct" for salaried employees, which was identified as Complainant's Exhibit 100. (Tr. at 871.) The decision to implement this policy was made in September 1997.<sup>47</sup> (Tr. at 877-79.) The "Positive Correction Action" policy, which was identified as Complainant's Exhibit 65, continues to apply to Respondent's hourly employees.<sup>48</sup> (Tr. at 871.)

## 2. Change in Compensation Policy

In 1994, the compensation policy for salaried sergeants, lieutenants, and captains was changed. (Tr. at 925-26.) As a result, salaried protective force supervisors no longer qualified for overtime compensation or "comp time" based on the number of hours that they worked. (Tr. at 926-27.)

## 3. December 1995

According to Ms. Bange, Mr. Walsh wrote a letter to Mr. Gillison informing him that Complainant allegedly complained to Mr. Peters about the number of hours he had been assigned and that he thought he was being discriminated against. (Tr. at 927.) Upon receipt of the letter, Mr. Gillison asked Mr. Walsh to meet with Complainant and resolve the issue. (Tr. at 928.) Mr. Gillison sent a copy of his response to Ms. Bange. (Tr. at 928.) He included a handwritten note in which he asked her to facilitate the meeting and send a representative from the Human Resources Department. (Tr. at 928.) Barbara Airsman, a Human Resources employee, attended the meeting and reported that the parties appeared to have an amicable relationship and that Human Resource intervention was not needed. (Tr. at 929.) No further complaints or problems were brought to the attention of the Human Resources Department until Complainant filed the above-entitled action. (Tr. at 929.)

## 4. Mr. Cosgrove

Mr. Cosgrove became Respondent's general manager in April 1997. (Tr. at 947.) Ms. Bange opined that he has a different management style than Mr. Gillison. (Tr. at 947-48.) She explained that Mr. Cosgrove places greater emphasis on the rules, the regulations, and the accountability of management. (Tr. at 948.) Within the first few days on the job, Mr. Cosgrove met with all of the employees that reported directly to him. (Tr. at 948-49.) During that meeting, he discussed his management style and philosophy. He also explained that once a final decision was made it should be followed, unless it was illegal, unethical, or immoral. (Tr. at 949.)

Mr. Cosgrove also held "all-hands meetings" with the salaried and hourly employees. (Tr. at 949-50.) At these meetings, Mr. Cosgrove emphasized the importance of following the company's rules, regulations, and policies, and explained that the employees would be held accountable for their actions. (Tr. at 950-51.)

## 5. Disciplinary Action Taken Against Complainant

Complainant's Exhibit 120 was identified as Ms. Bange's typed notes of the meeting between Mr. Cosgrove, Complainant, Larry Barela, and herself on January 28, 1998. (Tr. at 951-53, 965-66; CX-120.) Similarly, Complainant's Exhibit 112 was identified as Ms. Bange's typed notes of the meeting between Mr. Cosgrove, Complainant, Bud Isom, and herself on November 6, 1997. (Tr. at 953-54, 965-66; CX-112.) Ms. Bange also participated in the meetings concerning the proposed "Return to Work Agreement." (Tr.

at 956.) Mr. Cosgrove appeared somewhat concerned that Complainant had not exhausted the internal remedies before publicly disclosing his security concerns. (Tr. at 967-68.)

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At these meetings, Complainant did not defend his actions on the ground that the classification review policy was not being enforced at RFETS. (Tr. at 954-55.) Rather, Complainant defended his actions on the ground that he was an ADC and that ADC's were not required to go through the Classification Office before making public disclosures. (Tr. at 955.) According to Ms. Bange, Mr. Cosgrove disagreed with this assertion. (Tr. at 955.) The proposed Return to Work Agreement contained a condition requiring Complainant to obtain a review from the Contractor Classification Office before publicly releasing information in the future. (Tr. at 956.) Complainant refused to abide by this condition. (Tr. at 956.) Until Monday, April 5, 1999, Complainant apparently took the position that he had a right to disclose information to the media without going through the Classification Office. (Tr. at 957.)

Complainant's Exhibit 124 was identified as a notice of disciplinary suspension that was never implemented. (Tr. at 897; CX-124.) Mr. Cosgrove decided to delay its implementation until the above-entitled action was resolved. (Tr. at 897.) Therein, Mr. Cosgrove states that Complainant violated "work rule #39, 'Violation of a security regulation or procedure,' as stated in the Rocky Flats Security Manual at Chapter 6." (Tr. at 897-98, 957- 58; CX-124. See also CX-100, 88.) Chapter 6 relates to security police officers, which are also known as "protective force" personnel.<sup>49</sup> (Tr. at 958; CX-88.)

Ms. Bange participated in the drafting of the disciplinary letter. (Tr. at 899- 904.) She also helped determine the appropriate punishment based on a comparison of previous punishments for similar violations. (Tr. at 914-16.) Ms. Bange recommended a one-day suspension. (Tr. at 914, 916-17.) Prior to March 1995, the Discipline Review Board would have been responsible for ensuring that a fair and appropriate level of disciplinary action was taken. (Tr. at 904.) However, the Discipline Review Board had previously been disbanded. (Tr. at 904.)

Ms. Bange testified that Complainant was the first employee to be disciplined for failing to go through the Classification Office before disclosing information to the media. (Tr. at 905, 915.) However, employees have been disciplined for violating work rule number 39 for other reasons. (Tr. at 905.) Complainant's Exhibits 63 and 64 were identified listings of employees that were disciplined for violating work rule 39.<sup>50</sup> (Tr. at 905, 909.)

## 6. Classification

Ms. Bange further testified that she contacted the Contractor Classification Office during Complainant's deposition to inquire whether a classification officer needed to be

present. (Tr. at 1399-1402.) She discussed the nature of the case with Mr. Cunningham and was advised that the presence of a classifier was not required. (Tr. at 1402.)

#### 7. Employee Check-Out Procedures

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The Human Resources Department is responsible for overseeing the check-out procedures for individuals leaving Respondent's employment. (Tr. at 1402-03.) Ms. Bange testified about some of the procedures that were in place when Mr. Peters left his employment in June 1996. (Tr. at 1403-04.) She explained that individuals leaving their employment were required, among other things, to participate in a security debriefing conducted by the Security Department. (Tr. at 1403.) At that time, such individuals were asked to sign documents stating that they had turned over all government documents and materials, and agreeing that they would not disclose any classified information. (Tr. at 1403-04.)

#### 8. Marilyn Mulhall

Marilyn Mulhall began working for Respondent in December 1992.<sup>51</sup> (Tr. at 888.) Ms. Bange reported to Ms. Mulhall from December 1992 to approximately June 1993.<sup>52</sup> (Tr. at 881, 883, 885.) Ms. Mulhall reported directly to Mr. Gillison. (Tr. at 882, 884.) Ms. Bange began reporting directly to Mr. Gillison in approximately June 1993. (Tr. at 885.)

Ms. Mulhall alleged that she had opposed 401K payments made to Mr. Gillison and another person. (Tr. at 881.) As such, Ms. Mulhall was considered to be a whistleblower. (Tr. at 881.) Prior to raising her concerns, no disciplinary action had been taken against Ms. Mulhall. (Tr. at 882.) She began experiencing disciplinary problems approximately one year after she had raised her concerns. (Tr. at 882.) Ms. Mulhall claimed that she was being treated unfairly in part because she questioned the 401K payments. (Tr. at 882.) Ms. Bange identified a series of documents pertaining to Ms. Mulhall's employment. (Tr. at 882-88. See also CX- 43, 44-46, 49-51, 54-56, 58, 60-61.) Mr. Gillison terminated Ms. Mulhall's employment by letter dated June 6, 1994. (Tr. at 881; CX-60, 61.)

In January 1994, Ms. Bange was counseling an employee in her office. (Tr. at 917-18.) Her office door was closed because the employee had asked to speak to her in private and did not want anyone to know about their meeting. (Tr. at 918.) There was a pounding on the door. (Tr. at 918.) Ms. Bange did not want to open the door and risk exposing the employee. (Tr. at 918.) "The pounding grew increasingly louder, again with a loud screaming of 'open this fucking door.'" (Tr. at 918.) She recognized the voice as being Ms. Mulhall's. (Tr. at 918.) Ms. Bange opened the door just a crack. (Tr. at 918.) Ms. Mulhall forced the door open, thus exposing the employee, and asked for a copy of a document. (Tr. at 918.) Ms. Bange believed that Ms. Mulhall's conduct was inappropriate and that some type of discipline was appropriate. (Tr. at 919. See also CX-51.)



In addition, Ms. Mulhall allegedly made inappropriate remarks to employees in order to help persuade them to participate in her home landscaping party. (Tr. at 919.) Moreover, three African-American employees complained that Ms. Mulhall was making racial slurs about them. (Tr. at 921.) Ms. Bange further opined that, based on her observations and knowledge, it was appropriate to require Ms. Mulhall to undergo a fitness for duty evaluation. (Tr. at 922.)

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9. Gary Cupp

Mr. Cupp was considered to be a whistleblower. (Tr. at 968.) Complainant's Exhibit 108 was identified as Ms. Bange's typed notes of the meeting between Mr. Cosgrove, Gary Cupp, Bud Isom, and herself on October 22, 1997. (Tr. at 968; CX-108.) Therein, Mr. Cosgrove tried to dissuade Mr. Cupp from continuing his internal letter writing campaign to Respondent's employees. (Tr. at 969; CX-108.) Mr. Cosgrove further remarked,

Well, your letter to DOE was a means to intimidate me wasn't it? You could have come to any one of us with your concerns. I am not saying you can't utilize the Whistle blower Program. But you owe it to us to try to work these issues [out] before you go to DOE.

(Tr. at 970; CX-108 at MG2713.)

10. Liaison to Respondent's Attorneys

Ms. Bange served as Respondent's corporate representative throughout the discovery phase of this matter. (Tr. at 869.) On February 11, 1997, Ms. Bange posted an employee bulletin requesting that all future document and deposition requests be referred to the Human Resources Department. (Tr. at 892-96; CX-93.)

**D. Testimony of Steven L. Cunningham**<sup>53</sup>

Steven L. Cunningham is the manager of the Contractor Classification Office. (Tr. at 850.) His direct supervisor for classification matters is Mr. Hoffman, the DOE manager at the site. (Tr. at 852.) For other matters, his chain of command runs through the managers at Worldwide Security, Respondent, and Kaiser-Hill. (Tr. at 852.)

1. Contractor Classification Office

The Contractor Classification Office provides classification guidance and seeks to avoid the inadvertent release of classified information. (Tr. at 843-44.) This office provides briefings for individuals that intend to make public disclosures of potentially classified information. (Tr. at 834, 836, 843.) Such a briefing takes anywhere from a few

minutes to a half-hour. (Tr. at 834, 836, 843.) The length and nature of the briefing will depend on the subject area to be discussed. (Tr. at 836, 841, 843.) It is not necessary to conduct such a briefing when a trained classification officer will be present during the interview. (Tr. at 838.)

## 2. EG&G Policy No. 2-9

Policy No. 2-9 was adopted by EG&G in the early 1990's. (Tr. at 844, 866- 67. See also CX-40.) At that time, the government was investigating RFETS for environmental crimes, and allegations were being made that the government was trying to suppress employee opinions concerning such crimes. (Tr. at 867.) According to Mr. Cunningham, it was not envisioned that employees would be expressing personal opinions on subjects other than environmental matters.<sup>54</sup> (Tr. at 867.)

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EG&G Policy No. 2-9 was in effect until 1995, when EG&G's contract was terminated. (Tr. at 846.) Hence, this policy was not in effect in late 1997. (Tr. at 846.) Nevertheless, Mr. Cunningham testified that he was informally following this policy from the date of its expiration to the date of the "white paper." (Tr. at 850-51, 855.)

## 3. "White Paper"

Complainant's Exhibit 117 was identified as a "white paper" written by Mr. Cunningham on or about December 17, 1997. (Tr. at 851, 866; CX-117.) The defense industry uses the term "white paper" to describe a position paper that is offered for the sole purpose of facilitating a discussion. (Tr. at 858, 860.) It is neither a policy nor a directive. (Tr. at 861.)

The white paper was written for the purpose of reiterating Mr. Cunningham's position on the expression of personal opinions.<sup>55</sup> (Tr. at 844, 846, 849-51.) The drafting of this paper became necessary because EG&G Policy 2-9 was no longer formally in effect.<sup>56</sup> (Tr. at 846, 849-52, 855.) It was never disseminated to the authorized derivative classifiers or the employees at large. (Tr. at 857, 860.) Moreover, it was not intended to supersede DOE Order 5650.2B. (Tr. at 862. See also CX-20.)

The general guidelines set forth in the white paper continue to be followed by the Contractor Classification Office. (Tr. at 857-58.)

## 4. Complainant

Complainant is a subject matter expert ("SME") in the area of safeguards and security. (Tr. at 842.) As such, Complainant knows more about the security operations at RFETS than Mr. Cunningham. (Tr. at 842-43.) However, Mr. Cunningham knows more about safeguards and security classifications than Complainant. (Tr. at 843.)

Complainant has asked Mr. Cunningham many classification questions over the years. (Tr. at 839.) Six or seven months before the formal hearing in this matter, Complainant had a brief discussion with Mr. Cunningham about a possible release of potentially classified information. (Tr. at 838.) Mr. Cunningham believes that Complainant has good judgment and would not intentionally disclose classified information to the public. (Tr. at 839-40.) To his knowledge, Complainant has not released any classified information. (Tr. at 840.)

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*a. CBS Evening News*

Mr. Cunningham testified that no classified information was contained on "the CBS tapes." (Tr. at 840.) However, Complainant was speaking about "Category II" or "Category III" information. (Tr. at 854. See also CX-20; RX-A.)

Mr. Cunningham was interviewed by Respondent's internal investigators as to whether Complainant had violated policies or procedures in connection with the CBS News release. (Tr. at 852.) He told the investigators that Complainant erred by speaking to the media in an official capacity. (Tr. at 853.) He testified that if someone identified himself as "Lieutenant Graf," he would be speaking officially. (Tr. at 856.) However, Mr. Cunningham conceded that he does not know whether Complainant portrayed himself as a lieutenant to the media or whether he was cast into that role by the media. (Tr. at 865-66.)

According to Mr. Cunningham, if Complainant intended to grant an interview to CBS News about security and guard training at RFETS, he needed to go through the Classification Office before making such a disclosure. (Tr. at 864.) He opined that it would be difficult for Complainant to have a "personal opinion" about security and guard training issues because Complainant is a subject matter expert ("SME") in the area of safeguards and security. (Tr. at 862-63. See also Tr. at 842.) He explained that:

[I]t's for a person to have a personal opinion . . . about a subject matter in which they're considered an expert. The value added by their experience, their background, [and] their training [] tends to make their personal opinion an educated opinion. It has value added and my understanding of a personal opinion is someone offering their personal views about a subject in which they're not an expert.

(Tr. at 863.) However, Mr. Cunningham conceded that subject matter experts were not dealt with separately in this white paper. (Tr. at 865.)

**E. Testimony of William R. Gillison<sup>57</sup>**

*1. Education and Employment History*

William R. Gillison has a bachelor's degree in criminal justice from Eastern Kentucky University, and a master's degree in criminal justice from Webster University. (Tr. at 1108.) He served in the United States Army for over twenty-one years where he was involved in the command and control of nuclear forces. (Tr. at 1108.) He also spent a portion of his military career engaged in nuclear security. (Tr. at 1109.) Subsequent to his retirement as a lieutenant colonel, he joined the Tennessee Valley Authority where he was responsible for nuclear power plant security. (Tr. at 1109.)

Mr. Gillison began working at RFETS in January 1990, as EG&G's manager of protective force operations. (Tr. at 993, 1109.) He became Respondent's general manager on April 13, 1992. (Tr. at 993.) He left his employment at RFETS prior to the CBS News broadcast of November 1997. (Tr. at 1113.) Mr. Gillison is currently the manager of security training and customer service at the Nonproliferation and National Security Institute in Albuquerque, New Mexico. (Tr. at 1018-19.)

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As general manager, he reported to Respondent's President Jim Long. (Tr. at 1021-22.) Mr. Gillison considered himself to be a very good manager. (Tr. at 1021-22.) He also opined that he was a political manager. (Tr. at 1022.) Mr. Gillison explained that there were occasions when the DOE and Kaiser-Hill required things to be done for expedience's sake, without regard to what their orders prescribed. (Tr. at 1023.) He was concerned that Kaiser-Hill did not always rely upon the expertise of Respondent's security professionals. (Tr. at 1077.)

## 2. Whistleblowers

Mr. Gillison does not consider whistleblowers to be disloyal employees. (Tr. at 1035-36.) He believes that employees should be able to come forward with their concerns without fear of retaliation. (Tr. at 1035.) Nevertheless, he opined that some employees abuse the whistleblower program when they are disciplined for other reasons. (Tr. at 1035-36, 1039.) He further opined that management should be given a reasonable opportunity to resolve internal problems before involving outside entities. (Tr. at 1035-36, 1038.)

### a. Jo-Marie Lisa

Jo-Marie Lisa was identified as a whistleblower and was ultimately terminated by Mr. Gillison. (Tr. at 1023.) He became aware of her whistleblower status after she had been terminated. (Tr. at 1023.)

Mr. Gillison attended a meeting between Ms. Lisa and Mr. Cole, president of Respondent, in which Ms. Lisa's corporate loyalty was discussed. (Tr. at 1040; CX-34.) Ms. Lisa had allegedly made inappropriate disclosures pertaining to the removal of two employees from their positions and made the statement that Respondent "was the whore

of [the] DOE." (Tr. at 1030, 1040-41.) Mr. Gillison also responded to questions concerning Complainant's Exhibit 42. (Tr. at 1041-46.) Ms. Lisa was terminated for insubordination.<sup>58</sup> (Tr. at 1024.)

*b. Ms. Mulhall*

Ms. Mulhall was hired as the assistant general manager for administration. (Tr. at 1024-25, 1042.) Approximately eighteen months later, she was terminated for rude and mean-spirited behavior toward her peers and subordinate employees. (Tr. at 1025-26.) Mr. Gillison provided several examples of such behavior. (Tr. at 1025.) During the course of her employment, Ms. Mulhall questioned whether Mr. Gillison and Mr. Gilmer should be receiving certain 401(k) payments. (Tr. at 1049, 1139-45.)

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*c. Mr. Armijo*

Mr. Armijo was identified as a whistleblower and was terminated by Mr. Gillison's predecessor. (Tr. at 1026.) Mr. Gillison became involved in a controversy arising under Mr. Armijo's employment screening. (Tr. at 1028-29.) Allegations had been made that Mr. Armijo was engaged in the sale of government equipment from his home. (Tr. at 1029, 1032-33.) However, these allegations were later determined to be unsubstantiated. (Tr. at 1028, 1033-34; CX-41.) When Mr. Gillison left his position as general manager, Mr. Armijo was still employed by Respondent. (Tr. at 1029.)

*d. Jeffrey B. Peters*

During Mr. Gillison's tenure at RFETS, Mr. Peters served as director of protective force operations and director of training. (Tr. at 996.) Mr. Gillison considered Mr. Peters to be trustworthy. (Tr. at 996.) He further opined that "for the most part, [Mr. Peters] did a very good job." (Tr. at 996-97.) Mr. Gillison explained that Mr. Peters chose to conduct himself in the way he thought was best, which was not necessarily in accordance with what the corporation would have wanted him to do. (Tr. at 997-98.) He recounted the following example:

In 1992 or 1993, Mr. Peters heard that Mr. Levernier<sup>59</sup> had a "hit list" of employees that he wanted to terminate. (Tr. at 998-99.) Mr. Peters began creating audiotapes of Mr. Levernier's conversations without Mr. Gillison's knowledge or authorization. (Tr. at 1000.) When Mr. Peters informed him that he was making these tapes, Mr. Gillison consulted with his superiors. (Tr. at 1000-01.) He then instructed Mr. Peters to stop making the audiotapes. (Tr. at 1001.) Approximately three to four months later, Mr. Peters informed Mr. Gillison that he had continued to make the tapes. (Tr. at 1001.) At that point, Mr. Gillison said he would take responsibility for any further taping. (Tr. at 997, 1000-01, 1003-04.)

During this period of time, Mr. Peters received excellent performance evaluations. (Tr. at 1001.) Mr. Gillison did not mark Mr. Peters down for continuing to create tapes of Mr. Levernier's conversations because he thought it was a very courageous thing to do. (Tr. at 1001-02.) Nevertheless, Mr. Gillison conceded that Mr. Peters' conduct constituted insubordination, and that he had, in effect, rewarded insubordination. (Tr. at 1003.)

Mr. Peters was legitimately concerned about security at RFETS. (Tr. at 998, 1082-87, 1090-1101.) Mr. Gillison began questioning Mr. Peters' loyalty when he learned that Mr. Peters had participated in a deposition without giving prior notice to the company. (Tr. at 1051-53; 1137-39.)

In December 1995, Mr. Peters was disciplined for disobeying an order given by Mr. Gillison in the presence of Respondent's customers.<sup>60</sup> (Tr. at 1060, 1113-30.) Mr. Gillison recounted an incident in which Mr. Peters' was asked to participate in an afternoon meeting concerning the improper handling of special nuclear material at the site. (Tr. at 1113-16.) Representatives of Kaiser-Hill, Safe Sites, Respondent, and the DOE were present at the meeting.<sup>61</sup> (Tr. at 1114-15.) According to Mr. Gillison, Mr. Peters became engaged in a heated argument with a support contractor about how to conduct a vulnerability analysis. (Tr. at 1115.) Mr. Gillison did

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not consider this subject to be particularly relevant to the subject at hand. (Tr. at 1115.) Therefore, Mr. Gillison reached over, tapped Mr. Peters' leg, and told him to stop it. (Tr. at 1115.) The meeting continued. (Tr. at 1116.) Sometime thereafter, Mr. Peters slammed his large notebook shut and started to leave the meeting. (Tr. at 1065, 1116.) Mr. Peters appeared to be furious and purposefully drawing attention to himself. (Tr. at 1118-19.) Mr. Gillison said, "Jeff, I don't want you to leave, please stay here." Mr. Peters said, "No, I'm going to go do my talking to Congress," or words to that effect. (Tr. at 1116. See also Tr. at 1065.) Mr. Gillison repeated the request with more force, but Mr. Peters left the room. (Tr. at 1116.) Mr. Gillison also testified about the series of events that transpired after the meeting was adjourned.<sup>62</sup> (Tr. at 1120-28, 1145-53.)

Based on the foregoing, Mr. Gillison opined that Mr. Peters did not leave the meeting with the express purpose of setting up a critical point target response. (Tr. at 1065, 1121.) He further opined that Mr. Peters does not handle disagreement well and has a very short fuse. (Tr. at 1117, 1119-20.) Mr. Gillison has counseled him on several occasions about the need to calm down, to be patient, and not to overreact. (Tr. at 1117.)

Mr. Gillison was very disturbed by Mr. Peters' behavior. (Tr. at 1116.) He explained that Mr. Peters the senior uniformed armed officer on the site had refused to abide by his request to remain in the meeting. (Tr. at 1116.) This was an affront to him personally, and sent a message to Respondent's customers that he could not control one of his senior officers. (Tr. at 1117.)

Similarly, Mr. Gillison was very upset that the DOE/OPM investigators did not place greater weight on the fact that Mr. Peters, an armed and uniformed official, had disobeyed an order in the presence of Respondent's customers.<sup>63</sup> (Tr. at 1064, 1073-74.) According to Mr. Gillison, it appeared that Respondent could not supervise or control its senior uniformed official in charge of security operations at RFETS. (Tr. at 1064-65.)

Mr. Peters was placed on administrative leave pending a fitness for duty evaluation. (Tr. at 1120-28.) Mr. Peters was eventually reinstated and reassigned to the director of training position. (Tr. at 1128, 1130, 1156.) Mr. Gillison made this reassignment because he no longer had confidence in Mr. Peters' ability to properly perform his security operation responsibilities.<sup>64</sup> (Tr. at 1129-31, 1152.)

Mr. Gillison testified about Complainant's Exhibit 82, which was identified as e-mail messages between Mark Silverman and Cal Waller.<sup>65</sup> (Tr. at 1077-81, 1092.) According to Mr. Gillison, Mr. Waller had no authority to terminate Mr. Peters, or direct Respondent to terminate Mr. Peters. (Tr. at 1080-81.) In other words, Mr. Gillison was not bound by any of Mr. Waller's suggestions. (Tr. at 1081.)

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### 3. Classification

From 1992 to 1995, Mr. Cunningham was employed by EG&G and had a "Q" clearance. (Tr. at 1009.) During that time, Mr. Gillison would typically contact the DOE if he had classification questions. (Tr. at 1009.) In approximately July 1995, Mr. Cunningham became an employee of Worldwide Security. (Tr. at 1009-10.) From that point on, Mr. Gillison relied on Mr. Cunningham for classification guidance. (Tr. at 1010.)

Mr. Gillison testified that he would generally contact the Classification Office for specific guidance before communicating with the media. (Tr. at 1010.) He understood that he was supposed to go through the Classification Office before making official representations to the media. (Tr. at 1011.) Mr. Gillison conceded that he did not follow the classification review procedure on one isolated occasion. (Tr. at 1010-12.)

In 1994, Mr. Gillison participated in a television interview concerning site security during the union work stoppage. (Tr. at 1011.) At midnight, the guard forces walked off the site and informed the news media that they were now on strike. (Tr. at 1012.) At 3:00 a.m., Mr. Gillison was notified that a film crew was at the East Gate and wanted to interview someone about whether the site was being properly secured. (Tr. at 1012.) He did not go through the DOE Classification Office because of the unique circumstances surrounding that event.<sup>66</sup> (Tr. at 1011-13.)

According to Mr. Gillison, the classification review policy had a dual purpose: 1) to help prevent inadvertent disclosures of classified information, and 2) to provide



classification personnel with advance notice of media releases. (Tr. at 1016.) He was unable to recollect a policy requiring that employees go through the Classification Office before stating their personal opinions to the media. (Tr. at 1017-21.) He opined that stating personal opinions about RFETS would be protected First Amendment activity. (Tr. at 1017.)

*a. Mr. Vissar*

Mr. Gillison was aware that Mr. Vissar, in his capacity as union president, was making public statements about security at RFETS during a union work stoppage.<sup>67</sup> (Tr. at 1005-06.) He did not have knowledge as to whether Mr. Vissar consulted with the Classification Office prior to making said disclosures. (Tr. at 1006-07.) Mr. Gillison had been advised to keep any discussions with Mr. Vissar to a personal level during the strike. (Tr. at 1007.) At that time, the internal security manager, Mike Hager, was responsible for ensuring that information was reviewed for classification purposes before it was disseminated. (Tr. at 1008-09.)

*b. Depositions*

Mr. Gillison testified that he has been deposed three times in the above-entitled action, and that no classification officers were present during the depositions. (Tr. at 1106.) He felt confident that he would not disclose classified information, and on several occasions he limited his remarks to ensure compliance with the classification regulations.<sup>68</sup> (Tr. at 1106-07.) He further testified that neither party made a classification officer available to him. (Tr. at 1107.)

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*4. Complainant's Whistleblower Activities*

Mr. Gillison opined that Complainant was a good worker. Complainant was extremely knowledgeable about the RFETS alarm system, and served as chairman of the Alarm Station Working Group for a period of time. (Tr. at 1053-54.) In 1996, Mr. Gillison considered Complainant to possess the greatest expertise in the site alarm system technology. (Tr. at 1073.)

Mr. Gillison was aware that Mr. Peters and Complainant wrote a letter to Congressman Skaggs dated December 8, 1995. (Tr. at 1054-55.) He opined that they had legitimate security concerns. (Tr. at 1082-87, 1090-1101.)

In February 1996, Mr. Peters and Complainant created a classified document discussing their concerns and made said document available to Mr. Gillison. (Tr. at 1055, 1130-31.) He reviewed the classified document which set forth their security concerns in great detail. (Tr. at 1059, 1064.) He decided not to discuss the security concerns with them in person because he was in the process of disciplining Mr. Peters for disobeying a public

order. (Tr. at 1059-60.) Rather, he assigned a Blue Ribbon Panel to evaluate the concerns set forth in the letter to Congressman Skaggs and the classified document. (Tr. at 1061, 1131-33.) The Blue Ribbon Panel consisted of the chief of security plans, a captain of protective force operations, and a manager of security support operations. (Tr. at 1063.) Mr. Gillison opined that these individuals were better equipped to assess the validity of the security concerns than he was. (Tr. at 1063, 1131-32, 1156-58.)

In the spring of 1996, Complainant and Mr. Gillison had a meeting to discuss their working relationship. (Tr. at 1055-56, 1134.) Complainant also conveyed his sincerity about the security concerns articulated in the classified document. (Tr. at 1056-57.) Although he was upset that Complainant "did not trust him to present his concerns," Mr. Gillison testified that he "felt no animus toward [Complainant]." (Tr. at 1057, 1064.) Mr. Gillison testified that he never retaliated against Complainant for this conversation. (Tr. at 1136.)

In April 1996, Complainant was placed on shift work. (Tr. at 1101.)<sup>69</sup> Mr. Gillison conceded that Complainant was overqualified for the shift supervisor position. (Tr. at 1102.) Nevertheless, he opined that the reassignment did not represent a demotion. (Tr. at 1101.) According to Mr. Gillison, the reassignment was probably due to the need for a competent shift supervisor. (Tr. at 1101.) He explained that Respondent was experiencing "significant cost cuts" at that time, and, as such, Respondent was lacking supervisors. (Tr. at 1101, 1111.) Reassignments were fairly common because they were laying off people during this period. (Tr. at 1111.)

Complainant's Exhibit 144 was identified as a letter from Joe Walsh, Complainant's supervisor, to Mr. Gillison dated April 4, 1996. (Tr. at 1103-04; CX-144.) Therein, Mr. Walsh addresses Complainant's allegations that he was being treated unfairly.<sup>70</sup> (Tr. at 1104; CX-144.) Mr. Gillison discussed the matter with Mr. Isom and Mr. Woods and suggested that Mr. Walsh and Complainant be encouraged to resolve the matter. (Tr. at 1110.) He recalled this issue being ultimately resolved. (Tr. at 1111.)

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#### **F. Testimony of Denise A. Graf**

Denise A. Graf has been married to Complainant for seventeen years. (Tr. at 933.) They have three children aged fifteen, twelve, and three. (Tr. at 933.) Complainant has been employed at RFETS during their entire marriage. (Tr. at 934.)

Prior to December 1995, they had a "normal marriage" with its "ups and downs." (Tr. at 934.) Complainant spent his free time with his family or at the airport. (Tr. at 934.) She opined that the most important things in his life are his family and his airplane. (Tr. at 939.)

Approximately five years ago, Complainant built the airplane with his father and learned to fly. (Tr. at 942.) Complainant spent time away from the children when he was

learning to fly. (Tr. at 943.) Since receiving his pilot's license, Complainant's children have occasionally accompanied him on flights. (Tr. at 943.) Flying gives him a chance to relax. (Tr. at 935, 943.) He continues to fly "occasionally." (Tr. at 943.)

According to Mrs. Graf, Complainant became "grumpier" after December 1995. (Tr. at 935.) She further opined that he became "a lot grumpier" after he was placed on administrative leave. (Tr. at 935.) The quality of their home life varied while Complainant was on paid administrative leave. (Tr. at 935-36.) She enjoyed spending more time with him. (Tr. at 936.) He was also able to spend more time with the children. (Tr. at 936.) Complainant has a good relationship with his children. (Tr. at 935.) Nevertheless, Mrs. Graf testified that the children have become less inclined to discuss their problems with him. (Tr. at 940.)

Since he returned to work, he does not spend as much time with his children. (Tr. at 940.) He also spends time working at home on this case. (Tr. at 940.) This case also limited the amount of time he could spend with two friends that recently died. (Tr. at 941.)

Stress has also been placed on their marriage. (Tr. at 937-38.) She considered leaving him after he returned to work, because she was tired of dealing with his mood swings. (Tr. at 938.) She explained that they used to talk about what is bothering him, but now he keeps his feelings to himself. (Tr. at 938, 940-41.) His mood has varied and he has had difficulty sleeping.<sup>71</sup> (Tr. at 936-37.) In addition, his stomach has been bothering him for several months. (Tr. at 936-37, 941.)

Although they rarely discuss their financial affairs, they have decided to save extra money until this matter is resolved. (Tr. at 939.) She is concerned that Complainant may lose his job. (Tr. at 939.) Consequently, they have not been taking any trips. (Tr. at 939.)

She is aware of the presidential order and congressional mandate to close down RFETS. (Tr. at 943.) She is also aware that Respondent's employees, including Complainant, have been notified that they will lose their jobs when the site closes. (Tr. at 944.) Indeed, they have begun to make plans in anticipation of the site closure. (Tr. at 944.)

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### **G. Testimony of Marcy A. Nicks**

Marcy A. Nicks began working at RFETS in July 1990, as an employee of the DOE. (Tr. at 268.) Ms. Nicks held the position of employee concerns manager from November 1995, to January 1997.<sup>72</sup> (Tr. at 272.)

Ms. Nicks has twenty-four years of government service. (Tr. at 270.) She was employed as a paralegal secretary for the Office of the Solicitor, Region 8, Department of Labor for approximately five years. (Tr. at 269-70.) She served as an OSHA inspector for

approximately two years. (Tr. at 269-70.) She also worked for the U.S. Treasury Department for approximately two years. (Tr. at 269-70.)

Prior to joining the DOE, she received clerical assignments through a temporary employment agency. (Tr. at 268.) Ms. Nicks began working for the DOE in April 1990. (Tr. at 268.) She has approximately one year of formal secretarial training from the National College of Business in South Dakota. (Tr. at 270-71.) Though Ms. Nicks received interviewing training from OSHA, she did not receive any formal interview training from the DOE. (Tr. at 270-71.)

In 1995 or 1996, Ms. Nicks participated in a joint investigation concerning Mr. Peters' claims of retaliation. (Tr. at 257-58.) Ms. Nicks, in conjunction with Office of Personnel Management ("OPM") investigator Linda Weghorst, conducted fact-finding sessions and issued a report with recommendations.<sup>73</sup> (Tr. at 258-59.)

Ms. Nicks identified Complainant's Exhibit 86 as a portion of the DOE/OPM investigative report. (Tr. at 259.) Complainant's Exhibit 79 was identified as a written synopsis of the interviews conducted with Mr. Gillison. (Tr. at 260.) Complainant's Exhibit 9 was identified as a written synopsis of the disciplinary action taken against Mr. Peters as compared with the rest of Respondent's work force. (Tr. at 261.)

Ms. Nicks was unaware that Mr. Gillison claimed her written synopsis inaccurately represented his statements. (Tr. at 273.) Nonetheless, Ms. Nicks concedes that she never provided a copy of her written synopsis to Mr. Gillison for him to review for accuracy. (Tr. at 272.) After she completed her investigation, however, she met with Mr. Gillison for approximately one-hour to discuss her understanding of his statements. (Tr. at 276.)

Likewise, Ms. Nicks did not provide a copy of the written statements to Ms. Bange for her to review for accuracy. (Tr. at 273.) She was also unaware that Ms. Bange thought that the report inaccurately represented her statements. (Tr. at 273.)

Ms. Nicks testified that the DOE directed her to exclude the recommendation section from her report. (Tr. at 262.) This section contained information that would have been favorable to Mr. Peters. (Tr. at 262.) The acting chief counsel for the DOE eventually took control of the Peters file. (Tr. at 267.)

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At some point after Ms. Nicks withdrew her recommendations, "all of the duties of the employee concern manager basically were removed from [her] position," and she was assigned other work. (Tr. at 263.) She further testified that her job performance rating declined.<sup>74</sup> (Tr. at 263-66.) Nevertheless, Ms. Nicks conceded that the DOE adopted a new rating system after her reassignment. (Tr. at 264.)

Ms. Nicks subsequently filed a complaint with the Equal Employment Opportunity Commission ("EEOC") claiming that her supervisors, Ms. Roberson and Paul Hartman, retaliated against her on the basis of gender. (Tr. at 273.) The complaint was filed, at least in part, in response to the unfavorable job performance rating. (Tr. at 275.)

## **H. Testimony of Jeffrey B. Peters**

### **I. General Employment History**

Jeffrey B. Peters is a former employee of Respondent. (Tr. at 278.) He graduated from high school in 1978, and served in the U.S. Air Force from 1979 to 1993. (Tr. at 504-05.) During that time, he took some community college courses. (Tr. at 504-05.) Mr. Peters began working at RFETS in 1984. (Tr. at 288, 387.) During his tenure at RFETS, he held the positions of protective force instructor, security manager, director of protective operations, and director of training. (Tr. at 279, 505.)

He served as the director of protective operations from 1992 to 1996.<sup>75</sup> (Tr. at 280.) In this capacity, Mr. Peters was the senior manager in charge of the protective force, which consisted of 300 to 500 security police officers. (Tr. at 280.) The protective force provided physical security protection for the special nuclear materials on the site. (Tr. at 282-92.) The protective force operations are governed by the Site Safeguard and Security Plan, which is approved by the DOE. (Tr. at 293-99, 502.) Two Site Safeguard and Security Plans were enacted during Mr. Peters' tenure at RFETS. (Tr. at 502-03.) In addition, each contractor conducted self assessments and the DOE attempted to perform annual audits. (Tr. at 503-04.) The Office of Security Evaluations also performed periodic security investigations and reports.<sup>76</sup> (Tr. at 504.)

In late 1995, Mr. Peters was placed on administrative leave. (Tr. at 280-81.) In early 1996, he accepted a voluntary reassignment to director of training. (Tr. at 280-81.) During his tenure at RFETS, Mr. Peters' overall job performance was rated "excellent to outstanding." (Tr. at 339-40.)

Mr. Peters left Respondent's employment in June 1996, after entering into a settlement with Respondent on his whistleblower complaint.<sup>77</sup> (Tr. at 288, 387.) At that time, he was receiving a yearly salary of \$89,000. (Tr. at 550.) Mr. Peters testified that the opportunities for obtaining similar positions with similar salaries are "extremely remote." (Tr. at 550.) According to Mr. Peters, his opportunities have been further diminished by his reputation as a whistleblower. (Tr. at 549-50.) Guarding nuclear materials is also more lucrative than other security guard positions. (Tr. at 550.) Indeed, Mr. Peters testified that security guards are generally paid \$6.00 to \$11.00 per hour. (Tr. at 550.) Mr. Peters is currently engaged in commodities trading and is starting an Internet training business. (Tr. at 509.)

## 2. Security Concerns

In October 1995, Mr. Peters became concerned about the safety and security at RFETS. (Tr. at 299-300.) Mr. Peters recounted an incident involving the movement and temporary storage of special nuclear materials. (Tr. at 300-35.) According to Mr. Peters, the required vulnerability analysis had not been conducted which was a direct violation of the Site Safeguard and Security Plan. (Tr. at 300-06, 516-17.) He further opined that an inadequate number of security officers had been assigned to guard the material. (Tr. at 311-14, 410-13. See also CX-78.)

Mr. Peters testified that he expressed his concerns to the DOE, Kaiser-Hill, and Respondent. (Tr. at 336-38.) Later, he told Respondent's general manager, Mr. Gillison, that he was going to contact the Office of the Inspector General and possibly the FBI. (Tr. at 336-37. See also Tr. at 362.) With respect to the FBI, Mr. Peters told Mr. Gillison that if he received an illegal order that significantly affected the security of the nuclear materials, he "would take over the site . . . as federal law requires." (Tr. at 514-15.) Mr. Gillison appeared to be supportive of Mr. Peters position. (Tr. at 337.)

In December 1995, the special nuclear materials were moved back to their original location. (Tr. at 338-39.) Mr. Peters opined that inadequate protection was employed during the move. (Tr. at 341-55.) He expressed his concerns during a meeting with managers from the DOE and Respondent. (Tr. at 353-54.) Mr. Peters found the meeting to be unproductive and started to leave. (Tr. at 345-55.) Even though Mr. Gillison asked him twice to stay, Mr. Peters left the meeting. (Tr. at 355.) On cross-examination, Mr. Peters conceded that he disobeyed a direct order from Mr. Gillison, his superior. (Tr. at 519-20.) He reasoned that it was more important to set up a "critical point target response" than participate in the meeting. (Tr. at 519-20.)

Shortly thereafter, Mr. Gillison called a meeting with Mr. Peters and Mr. Gilmer.<sup>78</sup> (Tr. at 355-57.) Mr. Peters asked Mr. Gillison whether he was questioning his judgment and reliability. (Tr. at 356-57.) Mr. Gillison responded, "yes." (Tr. at 356-57.) Mr. Peters then said, "I'm telling you under the PSAP order that we all follow, Personal Security Assurance Program order, that if you doubt [my] judgment or reliability, you have to remove me from my position and send me for evaluation, fitness for duty." (Tr. at 356-57, 513.) Mr. Peters threw his badge down on the table and started to take off his gun. (Tr. at 357.) He was told to wait while Mr. Gillison and Mr. Gilmer discussed the situation with Ms. Bange, the human resources director. (Tr. at 357.) Shortly thereafter, he was informed that he was being placed on administrative leave pending a fitness for duty review and a disciplinary review. (Tr. at 357-58, 419.)

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Mr. Peters conceded that Mr. Gillison had an obligation to refer him to the Personnel Security Assistance Program ("PSAP") if he was genuinely questioning his emotional well-being. (Tr. at 513.) He explained that this mechanism is employed to reduce internal



threats to security. (Tr. at 512-14.) He also testified that Respondent could be described as a paramilitary group, and that failure to obey an order is potentially insubordination. (Tr. at 519.) Mr. Peters further testified that he is a very proud man. (Tr. at 513.)

### 3. Letters to Congressman Skaggs

After being placed on administrative leave, Mr. Peters contacted the union and the office of Congressman Skaggs, the latter of which asked him to place his concerns in writing. (Tr. at 358.) Mr. Peters contacted Complainant and asked him to help write two letters to Congressman Skaggs dated December 7, 1995 and December 8, 1995.<sup>79</sup> (Tr. at 358, 360-61, 423, 425.) According to Mr. Peters, neither Mr. Angelo nor Sharon Usselman helped draft the letter(s) to Congressman Skaggs. (Tr. at 426-27.)

The letter dated December 7, 1995, was written at Mr. Peters' home. (Tr. at 427.) The letter dated December 8, 1995, was written on Complainant's home computer. (Tr. at 423-24; CX-72.) Mr. Peters and Complainant knew the second letter might be "borderline." (Tr. at 423-24.) Complainant also knew that his hard drive would have to be wiped clean if the letter contained classified information. (Tr. at 423.)

The letter dated December 8, 1995, did not contain any markings indicating that it had been reviewed for classification. (Tr. at 496. See also CX-72.) Complainant told Mr. Peters that he could not use the classification stamps because he was not acting as an "official classifier from the plant." (Tr. at 496.)

The DOE asserted that the second letter contained classified information and asked Mr. Peters where it had been written and who had copies. (Tr. at 424.) Worldwide Security went to Complainant's home, "wiped out his files, [and] took his ribbon." (Tr. at 424.) In addition, Mr. Gilmer asked Mr. Peters to bring his ribbon to the site.<sup>80</sup> (Tr. at 424, 427, 432.) Mr. Peters argued with Mr. Gilmer about whether the letter was unclassified. (Tr. at 432.)

Complainant's Exhibit 73 was identified as a DOE memorandum from Bryan Siebert, DOE Director of Declassification, to Edward McCallum, DOE Director of Safeguards and Security, dated December 15, 1995. (Tr. at 428; CX-73.) Therein, Mr. Siebert states that the letter from Mr. Peters to Congressman Skaggs dated December 8, 1995, contains no classified information. (CX-73.)

Dr. Furman conducted Mr. Peters' fitness for duty review. (Tr. at 420.) He recommended that Mr. Peters receive stress management instruction and return to work without restrictions. (Tr. at 419-20.) Ms. Bange informed him that a disciplinary investigation was being conducted and that a Return to Work Agreement would need to be drafted. (Tr. at 420-21.) During a meeting with Mr. Gillison, Mr. Gilmer, and Ms. Bange, Mr. Peters was provided with a disciplinary letter stating that he had violated



work rules, including insubordination. (Tr. at 421-22.) Mr. Peters was also asked to write down his security concerns. (Tr. at 422.)

In February 1996, Mr. Peters and Complainant wrote an eight page document detailing their security concerns. (Tr. at 422, 517-18.) Complainant also classified this document. (Tr. at 422.)

#### 4. DOE Investigation

Complainant's Exhibit 76 was identified as a DOE memorandum issued by Donald J. Solich and Edmund A. Szymanski in which the allegations raised in the Mr. Peters' letter dated December 8, 1996, to Congressman Skaggs are reviewed.<sup>81</sup> (Tr. at 491-92; CX-76.) The review team interviewed thirty-eight individuals and substantial documentation. (Tr. at 492; CX-76.)

In December 1995, Mr. Solich met with Mr. Peters. (Tr. at 435.) Mr. Peters offered to provide him with tape recorded conversations and documents to substantiate his allegations.<sup>82</sup> (Tr. at 435.) He also suggested that he obtain a classified package of documents, which Mr. Solich then obtained and reviewed. (Tr. at 436-37.) Mr. Solich allegedly told Mr. Gillison that Mr. Peters had tape recorded conversations with him, and "all hell broke loose." (Tr. at 436.) Mr. Gillison instructed Mr. Peters to leave the site. (Tr. at 436-37.) He further testified about Complainant's Exhibit 89, which was identified as a transcript of recorded conversation between Mr. Peters and Mr. McCallum on February 7, 1996.<sup>83</sup> (Tr. at 437-47, 551; CX-89.)

On cross-examination, Mr. Peter was asked about several of the conclusions contained in the report. (Tr. at 492-95.) While he disagrees with some of the conclusions, he concedes that there is room for genuine disagreement. (Tr. at 492-95, 552.)

#### 5. DOE/OPM Investigation

Office of Personnel Management Investigator Linda Weghorst and DOE Employee Concerns Manager Marcy Nicks conducted a joint investigation to determine whether Mr. Peters' had been retaliated against for his whistleblower activities.<sup>84</sup> (Tr. at 447-48.) They found that there was an appearance of retaliation against him. (Tr. at 457. See also CX-86.) Mr. Peters entered into a settlement agreement with Respondent and left his employment with Respondent in June 1996. (Tr. at 387, 448, 456-57.)

#### 6. Defense Nuclear Facility Safety Board

Since leaving RFETS, Mr. Peters has relied on conversations with Rob Gary, Jim Fox, and Complainant to determine whether site security is adequate. (Tr. at 510.)

In early 1997, Mr. Peters met with representatives from the Defense Nuclear Facility Safety Board ("DNFSB") on two occasions to discuss site security concerns. (Tr. at 530-31.) Said meetings were held at Complainant's home. (Tr. at 531.) Mr. Peters was satisfied with their responses and reactions to his stated security concerns. (Tr. at 531-32.) Later, a Board representative expressed his appreciation to Mr. Peters for providing information which ultimately resulted in the passage of legislation. (Tr. at 533-34.)

#### 7. *Denver Post and CBS News*

In 1997, Mr. McCallum provided Mr. Peters with some documents and suggested that he contact the news media about the security at RFETS. (Tr. at 460-62, 473-74; CX- 1, 138.) In May 1997, Complainant served as a classifier during Mr. Peters' interview with the Denver Post. (Tr. at 462, 469-70, 472.) Mr. Peters chose not to contact the Classification Office because the DOE had previously declined to review documents in his personal possession. (Tr. at 470-71; CX-92.) The Denver Post published stories on May 20, 1997, and May 21, 1997. (Tr. at 473-76; CX-11, 97, 115.)

Later, a producer from CBS News contacted Mr. Peters. (Tr. at 477.) Mr. Peters, Mr. Ridenour, and Complainant met with representatives from CBS News to discuss site security issues on two separate occasions. (Tr. at 477, 521-22, 528-29.) The first meeting was held at the Briarwood Inn restaurant and the second meeting was held at a hotel in South Denver. (Tr. at 528.) In addition, they provided CBS News some aerial footage of RFETS which was taken from Complainant's airplane. (Tr. at 529.) Mr. Peters also played a twelve-minute excerpt of a audiotaped conversation between himself, Mr. Gillison and Mr. McCallum. (Tr. at 530.)

#### 8. *Skaggs Committee Investigation*

In 1998, an investigation into site security was also conducted by the "Skaggs Committee." (Tr. at 497-500.) Mr. Peters was not interviewed by any of the Committee members prior to the issuance of their reports. (Tr. at 500.) Nevertheless, he opined that his letter dated December 8, 1995, prompted the investigation. (Tr. at 499.) He further opined that he disagrees with the conclusions and recommendations contained in the Skaggs Committee reports. (Tr. at 500.)

#### 9. *Classification Policies and Procedures*

In 1994, ABC World News interviewed Mr. Peters at RFETS concerning \$32 million in stolen government property. (Tr. at 366-74.) The interview was conducted on the site. (Tr. at 528.) During the interview, he was asked general questions about RFETS security. (Tr. at 371-72.) Mr. Peters did not go through the Classification Office before the interview, and he was not reprimanded or disciplined for failing to do so. (Tr. at 370.)

During a union strike in 1994, Mr. Peters was asked to sign a letter concerning the security at RFETS. (Tr. at 375-76.) Said letter did not contain a classification review stamp. (Tr. at 375.) It was sent to the local media. (Tr. at 375-76.) Mr. Gillison participated in a media interview concerning the adequacy of site security during the strike. (Tr. at 382.) Mr. Peters was present when the DOE public affairs office notified Mr. Gillison that the media was on site. (Tr. at 382.) He did not observe Mr. Gillison contact the Classification Office prior to the interview. (Tr. at 382.) Mr. Peters opined that there was a potential for releasing classified information, and that a prudent person would have contacted the Classification Office. (Tr. at 382-83.)

According to Mr. Peters, Dave English spoke on the Militia News Network about site security issues. (Tr. at 377.) Mr. Peters discussed this incident with Mr. Gillison. (Tr. at 378.) Mr. Gillison informed him that Mr. English was exercising his freedom of speech and no action could be taken against him, provided that no classified information was released. (Tr. at 378- 79, 381.) Management conducted an investigation to determine whether classified information had been released. (Tr. at 379-81.) Indeed, Mr. Peters asked Bud Isom, director of operations administration, to conduct an investigation. (Tr. at 381.) Later, he was informed that no classified information had been released to the public. (Tr. at 381.)

During this time, Mr. Peters had a "Q" clearance.<sup>85</sup> (Tr. at 384.) During his employ, he was under the impression that only written documents being sent outside RFETS were required to be reviewed for classification. (Tr. at 383.) He did not understand this policy to apply to oral communications. (Tr. at 383.) Nevertheless, he would contact an ADC if questions were posed to him that could potentially lead to the release of classification information. (Tr. at 385.)

Mr. Peters opined that there was a problem with the enforcement of classification policies. (Tr. at 385.) He attributed the problem to inadequate training throughout the plant. (Tr. at 385.) Respondent had an internal classification and training personnel that is responsible for classification training. (Tr. at 386.) In 1990 and 1991, Mr. Peters had oversight of the internal classification training program. (Tr. at 386.) Later, the training function was absorbed by the operations administration and human resource personnel. (Tr. at 386.) This function was eventually reassigned to Worldwide Security, a subcontractor of Respondent. (Tr. at 387-88.)

### **I. Testimony of David E. Ridenour**

From January 1997 to April 10, 1997, David E. Ridenour served as the DOE's director of safeguards and security at RFETS. (Tr. at 770-72.) Mr. Ridenour submitted a resignation letter on March 31, 1997, which was identified as Complainant's Exhibit 138. (Tr. at 772.)

Mr. Ridenour received a temporary "Q" clearance approximately five to six weeks before his resignation. (Tr. at 784.) Prior to that time, he did not have access to classified information. (Tr. at 784.)

During his employment at RFETS, he observed site safeguards and security problems.<sup>86</sup> (Tr. at 772-77, 785-90.) He further testified that his supervisor severely limited his ability to increase contractor oversight. (Tr. at 772-77.) Hence, Mr. Ridenour was unable to implement his proposed changes in the safeguards and security program. (Tr. at 772-77, 785-90.) Under these conditions, Mr. Ridenour determined that he could not be effective and that remaining in this position would compromise his integrity. (Tr. at 776-77.)

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Complainant's Exhibit 1 was identified as the Status of Safeguards and Security report prepared by Edward J. McCallum, the DOE's national director of safeguards and security. (Tr. at 778-79; CX-1.) Therein, RFETS received an "unsatisfactory" program management rating for the 1996 calendar year. (Tr. at 780; CX-1.) Mr. Ridenour received a copy of this document in January 1997, during the course of his employment at RFETS. (Tr. at 779.)

Complainant's Exhibit 140 was identified as a copy of the 22nd Annual Report to the President on the Status of Safeguards and Security. (Tr. at 781.) Therein, RFETS received a "marginal" program management rating for the 1996 calendar year. (Tr. at 781-82.) Mr. Ridenour did not receive a copy of this document during the course of his employment at RFETS. (Tr. at 781-82.)

Mr. Ridenour is a professional engineer and lives approximately five miles from RFETS in Arvada, Colorado. (Tr. at 776, 783-87.) Prior to joining RFETS, Mr. Ridenour served as the manager for technology implementations at the DOE's Fernald Site for approximately five years. (Tr. at 771.) He also served in the U.S. Air Force where he received ten years of nuclear weapons experience. (Tr. at 771.)

### **J. Testimony of James A. Vissar**

James A. Vissar began working at RFETS in June 1985, as a security police officer. (Tr. at 391.) Mr. Vissar also served as president of the local union for a period of time. (Tr. at 392.) He voluntarily retired from his employment in 1995.<sup>87</sup> (Tr. at 391.)

In his capacity as union president, Mr. Vissar spoke with the media about a variety of different issues. (Tr. at 394, 396, 399.) On November 2, 1994, the union went on strike for approximately six weeks. (Tr. at 402.) During the strike, Mr. Vissar participated in a local radio talk show and expressed his concerns about the replacement security guards at RFETS. (Tr. at 394-96, 398.) For example, he stated that there was an insufficient number of security force personnel to adequately guard the facility. (Tr. at 397.) Mr. Vissar expressed similar concerns to local television correspondents during the strike.<sup>88</sup> (Tr. at 397.)

At this time, Mr. Vissar had a "Q" security clearance. (Tr. at 396.) He did not go through the Classification Office before making disclosures to the media and was never

informed that he had released classified or UCNI information. (Tr. at 396-97.) Mr. Vissar testified that he was not disciplined for disclosing information to the media. (Tr. at 398, 399.) He only recalled one occasion when he was told to go through the Classification Office before disclosing information to the public. (Tr. at 400.)

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In 1993, Mr. Vissar told the DOE plant manager<sup>89</sup> that he was planning to submit correspondence to Congress and the White House concerning the DOE director of security. (Tr. at 400, 403.) The DOE plant manager told him that he should have the DOE Classification Office review the letter. (Tr. at 400, 403.) Mr. Vissar was concerned that the DOE Classification Office might not perform an impartial classification review, so he had the Contractor Classification Office perform the review instead. (Tr. at 400-01, 403-04.)

### **K. Testimony of Michael T. Angelo**

Michael T. Angelo began working at RFETS in 1980. (Tr. at 1168.) He has been employed by Respondent since 1989, when Respondent assumed the RFETS security contract. (Tr. at 1168.)

#### **1. Education and Training**

Mr. Angelo is a high school graduate with two years of college education. (Tr. at 1181-82.) He took courses at Colorado State University, Fort Collins, toward a degree in business management. (Tr. at 1181-82.)

Mr. Angelo has more seniority at RFETS than Complainant. (Tr. at 1168.) Mr. Angelo, along with several other operators, trained Complainant after he was assigned to the Central Alarm Station ("CAS"). (Tr. at 1169.) Nonetheless, Complainant received a promotion to lieutenant before Mr. Angelo.<sup>90</sup> (Tr. at 1183.) Unlike Complainant, Mr. Angelo has not been certified as an ADC, and has not received training from the Association of Public Safety Communications Officers. (Tr. at 1197.)

#### **2. Central Alarm Station Reassignments**

Mr. Angelo currently holds the position of central watch station supervisor, CAS lieutenant. (Tr. at 1168.) In this capacity, he works with the alarm system monitoring capabilities, the radio and manual alarm systems, and the shift operation personnel. (Tr. at 1169, 1201.)

In early 1995, Mr. Angelo and Complainant were both employed as Central Alarm Station ("CAS") lieutenants and were both assigned to five-day work weeks. (Tr. at 1173.) In this capacity, they were both responsible for performing relief work for the shift supervisors in the CAS. (Tr. at 1174.) However, Mr. Angelo received the majority of the

overtime assignments. (Tr. at 1174, 1196.) During this time, Respondent was implementing cutbacks and backfilling positions. (Tr. at 1173, 1194.)

Mr. Angelo and Complainant both participated in the CAS working group. (Tr. at 1198.) Complainant eventually became chairman of this committee. (Tr. at 1198.) Complainant also chaired a DOE alarm system working group committee. (Tr. at 1199.)

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Around September 1995, there was a vacancy in the shift supervisor personnel. (Tr. at 1173.) Mr. Angelo was reassigned to a CAS supervisor position. (Tr. at 1173.) Though his operations duties remained the same, he began working a twelve-hour shift.<sup>91</sup> (Tr. at 1173, 1199.) At this time, Complainant assumed Mr. Angelo's shift relief responsibilities. (Tr. at 1173.) Consequently, Complainant was assigned a greater share of the shift relief work. (Tr. at 1173.)

In December 1995, various CAS supervisors were taking time off. (Tr. at 1173-74, 1176, 1195-96.) Complainant was the only relief lieutenant available for the shift supervisor positions.<sup>92</sup> (Tr. at 1173-74.) Mr. Angelo was unavailable to fill these vacancies because he had been reassigned to fill a twelve-hour shift position. (Tr. at 1196.) As a result, Complainant received additional shift relief assignments. (Tr. at 1173-74, 1176.) He worked a lot of overtime during this month. (Tr. at 1173-74, 1176.)

Complainant worked a lot of overtime in December 1995. (Tr. at 1173-74, 1177, 1195.) Complainant told Mr. Angelo that he intended to take a one-or-two-week block of "comp time" in early 1996, to make up for the overtime hours. (Tr. at 1177-78.) "Comp time" was generally taken in one-or-two-day increments.<sup>93</sup> (Tr. at 1177-78.) Mr. Angelo told Complainant that nobody had ever taken a one-or-two-week block of consecutive "comp time" because doing so would have adversely impacted the shift operations. (Tr. at 1178.)

Around this time, the salaried employees' compensation schedule was changed. (Tr. at 1178.) As a result, salaried employees no longer received overtime compensation. (Tr. at 1178.) Mr. Angelo did not recall the "comp time" policy being changed. (Tr. at 1178.)

Later, Complainant was reassigned to a shift supervisor position. (Tr. at 1175.) Mr. Angelo was told by his supervisor, Captain Leach, that the reassignments were due to a reduction-in-force. (Tr. at 1175, 1194.) He further testified that the reassignments did not appear to be retaliatory in nature. (Tr. at 1175.)

In March 1999, Mr. Angelo was reassigned to a five-day work week to facilitate program operations at the CAS. (Tr. at 1180.) This change was not a promotion and did not involve an increase in salary. (Tr. at 1180.)

Mr. Angelo opined that he and Complainant were equally well qualified for the program operations position. (Tr. at 1170-71, 1180.) Mr. Angelo conceded that

Complainant may have superior technical skills. (Tr. at 1170-71.) Nevertheless, he testified that he possesses superior managerial and interpersonal skills. (Tr. at 1170-71, 1201-02.)

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### *3. Affidavit*

On February 17, 1999, Mr. Angelo signed an affidavit which was identified as Complainant's Exhibit 145. (Tr. at 1184-86; CX-145.) Mr. Angelo testified that he received his reassignment to program operations approximately five weeks after he had signed this affidavit. (Tr. at 1185.) Complainant's counsel questioned Mr. Angelo about the statements contained in his affidavit, in an unsuccessful effort to impeach him. (See, e.g., Tr. at 1186-93, 1199-1201, 1203-04. See also Tr. at 1202-03.)

### *4. Letter to Congressman Skaggs*

Mr. Angelo testified that, at the request of Mr. Peters, he reviewed a draft letter to Congressman Skaggs.<sup>94</sup> (Tr. at 1171, 1187. See also CX-72.) At this time, Mr. Peters was his supervisor. (Tr. at 1193.) Mr. Angelo commented on the substance of the letter, but he did not actually help write the letter.<sup>95</sup> (Tr. at 1172, 1187-89.) At that time, many employees felt that there were inadequate protection capabilities. (Tr. at 1171.) He opined that these problems have subsequently been rectified. (Tr. at 1171-72.) In his opinion, Respondent did not retaliate against anyone for their involvement with the letter to Congressman Skaggs.<sup>96</sup> (Tr. at 1173, 1193.)

### *5. Classification Review Policy*

Mr. Angelo further testified that site training and hiring practices require employees to go through the Classification Office prior to making public disclosures. (Tr. at 1179- 80, 1200. See also CX-145.) His understanding of the classification review policy has been derived from practices and procedures in place during his tenure at RFETS. (Tr. at 1202.) For example, he has received annual training concerning the classification review procedures. (Tr. at 1200.)

### *6. Work Stoppage in 1994*

During the 1994 work stoppage, Mr. Leach and Mr. Walsh worked in the Central Alarm Station ("CAS"). (Tr. at 1196.) According to Mr. Angelo, neither Mr. Leach nor Mr. Walsh performed Complainant's job at that time. (Tr. at 1196-97.)

## **L. Testimony of Michael M. Cosgrove<sup>97</sup>**

### *1. Education and Employment Background*



Michael M. Cosgrove is Respondent's senior vice president and general manager for security programs at RFETS. (Tr. at 1208.) Mr. Cosgrove has an associate's degree in criminology from Miami Dade Community College, a bachelor's degree in criminal justice from Florida International University, a master's degree in adult education with a human resource concentration from Florida International University, and a doctorate in criminal justice management from La Salle University. (Tr. at 1208.)

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Mr. Cosgrove was employed by the City of Miami, Florida Police Department, for eighteen years where he served as a police officer, sergeant, lieutenant, captain, major, assistant chief, and acting chief. (Tr. at 1209.) In the capacities of police sergeant, lieutenant, and captain, Mr. Cosgrove was responsible for ensuring that the Department's policies and procedures were implemented in the field. (Tr. at 1212.) Moreover, he was responsible for enforcing departmental policies and procedures while serving as a major and an assistant chief. (Tr. at 1212.) During his tenure at the Miami Police Department, Mr. Cosgrove adopted the philosophy that policies and procedures exist to provide guidance and establish parameters for employees, and, as such, that employees should work within the established parameters. (Tr. at 1213.)

In 1984, Mr. Cosgrove joined the Central Training Academy in Albuquerque, New Mexico, which was operated by Wackenhut Services, Inc. (Tr. at 1209-10.) This DOE facility trains security police officers on how to protect nuclear weapons and components. (Tr. at 1209-10.) When Mr. Cosgrove departed, he was serving as general manager and vice president. (Tr. at 1210.)

Next, Mr. Cosgrove served as general manager and senior vice president of protective force operations at the Savannah River nuclear facility in South Carolina, which was operated by Wackenhut Services, Inc. (Tr. at 1210.) The Savannah River facility is governed by the same DOE rules and regulations that govern RFETS. (Tr. at 1215.) For example, the Savannah River nuclear facility had a policy requiring employees to go through the Classification Office prior to releasing information to the public. (Tr. at 1215.)

Mr. Cosgrove was also employed as the chief instructor and program manager for the U.S. Department of State's antiterrorism assistance program. (Tr. at 1210.) He eventually rejoined Wackenhut Services, Inc. in Washington, D.C., where he interfaced with the Central Intelligence Agency and the Federal Bureau of Investigation on crisis management, special weapons, and tactical response capabilities. (Tr. at 1211.)

On April 1, 1997, Mr. Cosgrove assumed the position of senior vice president and general manager for Respondent.<sup>98</sup> (Tr. at 1208, 1213-14, 1279.) The hiring decision was made by Jim Long, Respondent's president. (Tr. at 1214.) Mr. Cosgrove understood that there were potential security problems at RFETS, and that Mr. Long believed Mr. Cosgrove would be capable of assessing and resolving such problems. (Tr. at 1214.)

## 2. Management of RFETS

RFETS is owned and operated by the DOE.<sup>99</sup> (Tr. at 1217.) The DOE has personnel on site to provide guidance and oversight. (Tr. at 1217.) The DOE has contracted with Kaiser-Hill to provide the site management services, including the integration of security and closure procedures. (Tr. at 1217-18.) Kaiser-Hill contracted with Respondent to provide the site security services.<sup>100</sup> (Tr. at 1215-16, 1218, 1275-77.) Respondent's primary objective is to protect nuclear weapon components from theft, sabotage, and unauthorized control or diversion. (Tr. at 1216.) Respondent is also responsible for protecting classified information, classified documents, and classified parts. (Tr. at 1216.) As such, Respondent oversees the Worldwide Security contract. (Tr. at 1216, 1218-19.)

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RFETS was described as a small city with hundreds of buildings on the site. (Tr. at 1219.) The protected area alone encompasses approximately four miles. (Tr. at 1219.) Five to six thousand people and thousands of cars enter the site each day. (Tr. at 1219-20.) RFETS has its own infrastructure including snowplows, traffic control, pedestrian control, and emergency vehicles. (Tr. at 1220.) It also has its own fire and police departments. (Tr. at 1220.)

As a result of a joint decision by Congress and the DOE, RFETS is scheduled to close in approximately 2006. (Tr. at 1218, 1220-21.) Consequently, employee certification and training programs are being established to equip employees with the skills necessary to gain employment after the closure of RFETS. (Tr. at 1221-22, 1396-97.) For example, Complainant will become eligible for college tuition reimbursement. (Tr. at 1222-23.) In addition, some employees will be reassigned to other sites. (Tr. at 1398.)

After Mr. Cosgrove joined RFETS in April 1997, major enhancements were made to security program areas that were considered to be at risk.<sup>101</sup> (Tr. at 1223.) Mr. Cosgrove also received authorization to enhance physical security and protective force capabilities. (Tr. at 1223-26.) Once these enhancements were made, however, he was primarily charged with maintaining the existing security levels through closure. (Tr. at 1224.) Mr. Cosgrove further testified that RFETS received a "satisfactory" rating for its 1998 safeguards and security program. (Tr. at 1224, 1229-30, 1287.)

## 3. Enforcement of Classification Policies and Procedures

Approximately one month after joining RFETS, Mr. Cosgrove held a series of all-hands meetings in which he explained his management philosophies. (Tr. at 1231-32.) During the meetings, he explained that everyone was expected to abide by the existing site policies and procedures and that said policies would be enforced. (Tr. at 1231-32.) Complainant did not ask Mr. Cosgrove to clarify or elaborate on this statement. (Tr. at 1232.)

*a. Denver Post Article*

The Denver Post published an article on May 20, 1997, concerning safety and security at RFETS. (Tr. at 1233, 1298, 1300. See CX-97.) Mr. Cosgrove participated in briefings and was interviewed by the Denver Post. (Tr. at 1310, 1313; CX- 97 at MG1757.) The article also referred to Complainant. (CX-97.)

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At that time, Mr. Cosgrove did not make any inquiries about whether Complainant had adhered to the classification review procedures. (Tr. at 1233-34, 1305-06.) Mr. Cosgrove explained that he was actively involved in assessing the site security program. (Tr. at 1233-34.) He assumed that Complainant had requested guidance from the Classification Office before making his public disclosures because that was the type of procedure that had been followed in his previous management positions.<sup>102</sup> (Tr. at 1233-34, 1236, 1325-26. See also Tr. at 1214-15.) He had conversations with his superiors and his staff about the substance of the article, but the issue of classification review never entered his mind.<sup>103</sup> (Tr. at 1234-35.)

At some point, Mr. Cosgrove discussed the Denver Post article with Mr. Dalton and Mr. Gillison. (Tr. at 1298-99.) According to Mr. Cosgrove, some of the security problems identified in the article were accurately portrayed and said problems were actively being addressed. (Tr. at 1302-03. See also CX-97.) He further opined that some of the allegations contained in the article could not be substantiated.<sup>104</sup> (Tr. at 1303-05.)

*b. CBS News Broadcast*

Later, the Public Information Office at Kaiser-Hill advised Mr. Cosgrove that CBS News was planning to do a story about site safeguard and security issues. (Tr. at 1237, 1292.) Mr. Cosgrove participated in a series of internal meetings in which he discussed what information would be disclosed to CBS News. (Tr. at 1237.) Mr. Cunningham participated in many of these meetings and addressed the classification issues. (Tr. at 1237, 1243.)

Personnel from the DOE, Kaiser-Hill, and Respondent conducted a site tour and participated in off-camera interviews with CBS News representatives.<sup>105</sup> (Tr. at 1238-40.) Mr. Cosgrove received classification guidance from Mr. Cunningham prior to his interview. (Tr. at 1238.) In addition, Mr. Cunningham was present during the site tour and off-camera interviews to provide classification guidance. (Tr. at 1238, 1291-92.)

Mr. Cosgrove became aware of Complainant's involvement in the CBS News story during a meeting with Marvin Brailsford of Kaiser-Hill, Hank Dalton of the DOE, and some members of his staff. (Tr. at 1242.) At that time, he read a copy of the CBS News press release dated October 28, 1997. (Tr. at 1242. See also CX-109.) Mr. Cosgrove was concerned about the potential release of classified information, because the press release

suggested that very specific information was going to be released about serious safety flaws<sup>106</sup> at Rocky Flats. (Tr. at 1242-43, 1310- 11.)

Consequently, Mr. Cosgrove began an administrative investigation into Complainant's contact with CBS News to determine whether classified information had been released and whether classification review procedures had been followed.<sup>107</sup> (Tr. at 1243, 1247-48, 1326-27. See also CX-119.) He was also interested in obtaining more detailed information about Complainant's security concerns. (Tr. at 1243, 1245-46.) Mr. Cosgrove did not assume that Complainant had followed the classification review procedures because Complainant had not participated in the preliminary briefings concerning the CBS News story.<sup>108</sup> (Tr. at 1309.)

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On November 6, 1997, Mr. Cosgrove held a meeting with Complainant. (Tr. at 1243-44.) During that meeting, Complainant opined that he had not disclosed any classified information to CBS News, and conceded that he chose not to go through the Classification Office before making public disclosures. (Tr. at 1243, 1246, 1309.) Moreover, Complainant never told Mr. Cosgrove that he was expressing his personal opinion, and that there is a personal opinion exception to the site disclosure rules. (Tr. at 1398.)

Complainant discussed some of his security concerns to Mr. Cosgrove, and mentioned that a classified letter had been submitted to Mr. Gillison.<sup>109</sup> (Tr. at 1234-44, 1285, 1302.) Mr. Cosgrove reviewed the classified letter in detail.<sup>110</sup> (Tr. at 1234-45.) He also reviewed Respondent's response to the classified letter, and information gathered during the DOE (Solich) investigation.<sup>111</sup> (Tr. at 1376-77.)

At this time, Mr. Cosgrove was not aware that Complainant had been reviewing Mr. Peters' documents for classification purposes, and, as such, made no inquiries into this area. (Tr. at 1312. See also Tr. at 1311-12.) During a later meeting, Complainant provided a copy of the Long & Jaudon letter to Ms. Bange or Mr. Cosgrove. (Tr. at 1354. See also CX-92.) Mr. Cosgrove opined that the Long & Jaudon letter does not relieve Complainant of his personal responsibility to abide by the classification review requirements. (Tr. at 1350-51. See also CX-92.)

The CBS News story was aired on November 24 and 25, 1997. (Tr. at 1247.) On January 28, 1998, Mr. Cosgrove held a second meeting with Complainant. (Tr. at 1247; CX-121, 122.) Respondent's internal investigators had informed Mr. Cosgrove that Complainant had refused to respond to certain questions pertaining to the disclosure of information.<sup>112</sup> (Tr. at 1248.) Therefore, Mr. Cosgrove personally requested that Complainant answer the questions and explained that the answers would not be used against him in any type of criminal proceeding.<sup>113</sup> (Tr. at 1248-49.) He further explained that Complainant's failure to answer the questions could lead to disciplinary action,

including termination. (Tr. at 1249.) This time, Complainant decided to cooperate fully with the investigation and provided detailed information in writing. (Tr. at 1249.)

Mr. Cosgrove opined that Complainant made a conscious decision not to follow the classification review procedures. (Tr. at 1251.) He interpreted Complainant's behavior to be an intentional violation of the site rules, as opposed to an unintentional mistake. (Tr. at 1251, 1296. See also Tr. at 1360.) Mr. Cosgrove explained that Complainant a CAS lieutenant with a "Q" level clearance and access to special nuclear materials should not be allowed to unilaterally and arbitrarily decide whether to abide by a site rule. (Tr. at 1251-52, 1260.)

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*c. Disciplinary Action*

Complainant was charged with violating the DOE's classification policy. (Tr. at 1330.) Mr. Cosgrove determined that Complainant should be disciplined for violating the classification review procedure, and that a one-day suspension would be the appropriate level of progressive discipline.<sup>114</sup> (Tr. at 1252, 1265-67.) He also wanted to secure Complainant's future compliance with the classification review procedure that requires employees to go through the Classification Office before disclosing information to the public. (Tr. at 1252-53, 1260.) However, Complainant would not agree to comply with the classification review procedure in the future. (Tr. at 1253-54, 1257-60.)

In addition, Mr. Cosgrove explained that the investigators recommended that Complainant should be referred to the Employee Assistance Program ("EAP") for psychological evaluation, and that he should be temporarily removed from his PSAP position. (Tr. at 1254.) He further testified that an intentional rule violation is grounds for such an evaluation. (Tr. at 1254.) Consequently, Mr. Cosgrove encouraged Complainant to voluntarily participate in the EAP, stating that he would mandate it if Complainant did not voluntarily comply.<sup>115</sup> (1254-56, 1263-64.) Mr. Cosgrove explained that Complainant had said, "if I were you I would pull my PSAP," or words to that effect. (Tr. at 1255.) This statement indicated that Complainant felt there was a problem, and, as such, left Mr. Cosgrove with no choice but to refer Complainant to the EAP. (Tr. at 1255.) Ms. Bange made arrangements for Complainant to participate in the EAP. (Tr. at 1381.)

Complainant received authorization from the EAP to return to work. (Tr. at 1257, 1381-82; CX-123.) In the interim, Respondent had developed a Corrective Action Plan for Complainant, which was similar to a return to work agreement. (Tr. at 1257. See also CX- 125.) The Corrective Action Plan required, among other things, that Complainant follow the classification review procedure before disclosing information to the public. (Tr. at 1258.) Complainant was also required to resolve problems through his chain of command. (Tr. at 1258, 1369-70.) Complainant signed the Corrective Action Plan, but included the following post-script:

I reserve my right to make disclosures of violations or perceived violations of the Energy Reorganization Act and/or the Atomic Energy Act. I do not admit that I have acted improperly in the past and protest this discipline.

(Tr. at 1257-59; CX-125.) Mr. Cosgrove interpreted the post-script to be Complainant's refusal to comply with the classification provision. (Tr. at 1259-60.) Consequently, Complainant was not permitted to return to work on the ground that he had refused to abide by the classification review procedure. (Tr. at 1260-63.) About this time, Complainant filed this whistleblower complaint. (Tr. at 1261. See also CX-128.)

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*d. Chain of Command*

Mr. Cosgrove described Complainant's traditional chain of command as his captain, the major, the director of operations, the deputy, and himself. (Tr. at 1340, 1343.) He testified that Complainant could properly comply with the classification review requirements without going through his chain of command. (Tr. at 1340.) Mr. Cosgrove also encouraged Complainant to be a "team player" and work within the organization before taking his security concerns outside the system. (Tr. at 1365-67. See also CX-120.) Nevertheless, Mr. Cosgrove acknowledged his inability to prevent Complainant from taking his security concerns outside the organization. (Tr. at 1365-69, 1370-71.)

Complainant was also informed that, as the holder of a "Q" clearance, he has a duty to bring his security concerns to Mr. Cosgrove's attention. (Tr. at 1368; CX- 111.) Mr. Cosgrove explained that, as general manager for site security, he needs to be informed about Complainant's security concerns in order to address those concerns. (Tr. at 1369-70.)

*e. Temporary Agreement*

The parties eventually entered into a temporary return to work agreement in which Complainant agreed to comply with classification review procedures through the duration of this litigation. (Tr. at 1262. See also CX-147.) Mr. Cosgrove further testified that Complainant would have been permitted to return to work in March 1998, if he had agreed to comply with the classification review procedures in the future. (Tr. at 1262-65, 1379-81.)

*f. Cosgrove Deposition*

During Mr. Cosgrove's deposition in this matter, no classifier was present. (Tr. at 1294-96.) Mr. Cosgrove did not think that a classifier's presence was necessary because he did not intend to discuss any potentially classified information in specificity. (Tr. at 1294-95, 1358.) He further opined that, in retrospect, it would have been prudent to have a classification officer attend the deposition. (Tr. at 1295, 1358.) Nevertheless, failure to



have a classification officer present at a deposition does not violate the site rules. (Tr. at 1295-96.)

Mr. Cosgrove further testified that he was deposed about security related issues in this matter without having gone through the Classification Office.<sup>116</sup> (Tr. at 1357, 1362.) Nonetheless, he has never participated in a media interview concerning site safety and security issues without going through the Classification Office. (Tr. at 1356.)

*g. White Paper*

Mr. Cosgrove has not read the "white paper" at issue in the case. (Tr. at 1296-97, 1332.) Moreover, he was unaware of Jody Giacomini's request for the paper and had not been briefed on it. (Tr. at 1297-98, 1332.) Rather, he became aware of the white paper during the course of this litigation. (Tr. at 1334.) Mr. Cosgrove further testified that a white paper does not supersede a DOE order or other site policy. (Tr. at 1297, 1331.)

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*4. Change in Disciplinary Policy*

In approximately November 1997, Respondent's disciplinary policies for salaried employees were changed. (Tr. at 1394.) Ms. Bange requested the change based upon her discussions with Kaiser-Hill representatives. (Tr. at 1394.) Mr. Cosgrove approved the policy change. (Tr. at 1394.)

Mr. Cosgrove also testified about some of the benefits that salaried employees receive. (Tr. at 1397-98.)

*5. Comparator Evidence*

*a. Classification Review*

Mr. Cosgrove conceded that it is possible that, during his tenure at RFETS, other employees have made disclosures to the media without following the classification review procedures. (Tr. at 1316. See also Tr. at 1317-21.) He further testified that ninety percent of Respondent's media contacts are coordinated through Kaiser-Hill's Public Information Office. (Tr. at 1339.) The Public Information Office coordinates these interviews with the Contractor Classification Office. (Tr. at 1339.)

When an employee is referenced in the media, Mr. Cosgrove does not automatically initiate an investigation into whether the employee followed the classification review procedures. (Tr. at 1316.) Rather, he deals with all potential policy violations on a case-by-case basis. (Tr. at 1321.) Mr. Cosgrove expects all of his employees to follow classification review procedures before making public disclosures (Tr. at 1321.) If he determines that employees are failing to comply with the classification policies because



of insufficient training, for example, he will institute the necessary training aspects to correct the problem. (Tr. at 1318.)

Complainant is the only employee that has told Mr. Cosgrove that he does not intend to abide by the classification review policy before making public disclosures. (Tr. at 1318.)

*b. Gary Cupp*

Gary Cupp is a veteran and has a post-traumatic stress disorder. (Tr. at 1268.) Mr. Cupp was experiencing periodic traumatic episodes that were interfering with his work. (Tr. at 1271.) Mr. Cosgrove had experience dealing with employees suffering from post-traumatic stress disorder when he was employed by the Miami Police Department. (Tr. at 1271-72.) Mr. Cosgrove confronted Mr. Cupp about his problem and agreed to counsel him as needed. (Tr. at 1271-72.) As a result, Mr. Cupp has become a very productive employee within the organization. (Tr. at 1272.)

In addition, Mr. Cosgrove had problems with Mr. Cupp going outside his chain of command. (Tr. at 1373; CX-108.) He was sending routine correspondence and information to the DOE and Kaiser-Hill, which had nothing to do with his whistleblowing activities.<sup>117</sup> (Tr. at 1373-74.) He was questioned about statements contained in Complainant's Exhibit 108. (Tr. at 1373-75. See also CX- 108.)

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**M. Testimony of Ronald Leach**

Ronald Leach began working for Respondent in December 1992, as captain of the Central Alarm Station ("CAS"). (Tr. at 792-93.) In 1992, Complainant and Mr. Angelo held administrative lieutenant positions at the CAS. (Tr. at 794.) At this time, they did not have regular shift responsibilities. (Tr. at 794.) Mr. Leach served as their immediate supervisor.<sup>118</sup> (Tr. at 793-94.)

*1. Armory*

The armory and the CAS were housed in the same building. (Tr. at 805.) When Mr. Leach was hired, Complainant was in charge of the armory. (Tr. at 804-05.) In the fall of 1992, Mr. Walsh asked Mr. Leach to assume responsibility for the armory.<sup>119</sup> (Tr. at 805.) This change was made so that Complainant would have more time to focus on the technical aspects of his job. (Tr. at 805.)

*2. Job Performance*

Mr. Leach considered Complainant's job performance to be very good. (Tr. at 797, 806-07.) Complainant and Mr. Angelo received similar performance ratings. (Tr. at 798.) Their performance was superior to the other employees. (Tr. at 798.) Mr. Leach never gave Complainant negative performance reviews. (Tr. at 797-98.)

Mr. Leach identified Complainant's Exhibit 2, pages MG0093 through MG0095, as Complainant's Performance Appraisal for July 1996 through June 1997.<sup>120</sup> (Tr. at 812.) Therein, Mr. Leach gave Complainant a total appraisal score of 880.75, which equates to the "exceeds requirements" category. (Tr. at 816; CX-2 at MG0095.) At this time, the operations director was trying to establish some uniformity between the numerical values that were assigned by the supervisors. (Tr. at 817-18.) Complainant and Mr. Angelo received the two highest performance appraisals in the department. (Tr. at 818.)

He opined that Complainant and Mr. Angelo have different strengths and weaknesses, but they have equal technical qualifications for a management position. (Tr. at 818.)

### 3. Overtime Assignments

Although he recalls Complainant working a lot of overtime in December 1995, Mr. Leach does not recall the specific reason(s) that the overtime assignments were made. (Tr. at 798-800.) Mr. Leach explained that Complainant primarily worked a forty-hour, five-day week. (Tr. at 798.) The operational officers were responsible for making additional assignments on the twelve-hour shift. (Tr. at 798, 814-15.) The administrative lieutenants were generally assigned shift work when there was an insufficient number of shift personnel. (Tr. at 799.) The absence of personnel could have been due to a reduction-in-force, scheduled vacation, sick leave, or personal emergencies. (Tr. at 799.)

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Mr. Leach was not qualified to relieve the shift supervisors because he lacked the technical expertise and was not armed.<sup>121</sup> (Tr. at 803-04.) Similarly, Mr. Walsh was not armed. (Tr. at 804.) Mr. Leach denied performing Complainant's job during a union work stoppage in 1994. (Tr. at 811.) Rather, he filled an alarm station operator position which he had been certified to perform. (Tr. at 811.)

### 4. "Comp Time"

In December 1995, Complainant told Mr. Leach that he was going to take at least one week of "comp time." (Tr. at 800.) Complainant later told him that Gary Sayers of payroll said that it could not be done. (Tr. at 801.)

Mr. Leach explained that Respondent had changed its pay structure. (Tr. at 801-02.) The overtime compensation had been averaged and factored into the salaries. (Tr. at 801-02.) Prior to the change, employees had been paid for the actual hours worked. (Tr. at 801-02.)

### 5. Transfers to Shift

Due to a reduction-in-force or a shortage of supervisors, Mr. Angelo and Complainant were transferred to shift supervisor positions. (Tr. at 794-96, 804.) Mr. Angelo was

transferred to the twelve-hour shift before Complainant. (Tr. at 795, 804.) He held that position for a number of months. (Tr. at 804.) Later, another supervisor left and Complainant was assigned to the twelve-hour shift. (Tr. at 804.) The director of operations and the department manager, Mr. Walsh, made the transfer assignments. (Tr. at 795-96.)

Mr. Leach identified Complainant's Exhibit 2, pages MG0097 through MG0099, as Complainant's Performance Appraisal for July 1995 through June 1996. (Tr. at 812.) It was signed and dated on August 27, 1996. Therein, Mr. Leach wrote:

Staff down sizing made it necessary to assign Mark to a 12 hour continuous shift. In my opinion[,] Mark is overqualified for this position. . . .

(Tr. at 813; CX-2 at MG0099.) Mr. Leach explained that he wanted Mr. Angelo and Complainant to be transferred back in his section. (Tr. at 813.)

#### 6. Claims of Retaliation

Mr. Leach testified that the transfer was not retaliatory in nature.<sup>122</sup> (Tr. at 795.) He further testified that he was never instructed to take retaliatory action against Complainant and never felt that he could ingratiate himself with management by taking such action. (Tr. at 797.)

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Complainant had told Mr. Leach that he had written a classified letter and a letter to Congressman Skaggs. (Tr. at 806.) Nevertheless, Mr. Leach never tried to stop Complainant's whistleblower activities. (Tr. at 806.)

Complainant also commented that he wanted to protect Mr. Leach from any repercussions from his whistleblower activities. (Tr. at 807.) Nevertheless, Mr. Leach denied counsel's suggestion that he limited his supervisory responsibilities in order to protect himself. (Tr. at 807.) Mr. Leach's career has not been adversely effected by Complainant's whistleblower activities. (Tr. at 807.)

Mr. Leach was not involved in the decision to place Complainant on administrative leave in January 1998. (Tr. at 807-08.) At this time, Complainant and Mr. Angelo were primarily working for John Trantanella, the shift captain. (Tr. at 808-09.)

Mr. Leach accompanied Complainant to a meeting with Mr. Horton and Ms. Davis. (Tr. at 808, 810.) Mr. Trantanella was not present at this meeting. (Tr. at 810.) According to Mr. Leach, Complainant did not exhibit any "bizzare" behavior. (Tr. at 808.) Rather, Complainant "seemed fine" and behaved professionally during the meeting. (Tr. at 808.)

#### **N. Testimony of Bryan Siebert**

Bryan Siebert is the Director of the Office of Declassification for the U.S. Department of Energy in Washington, D.C. (Tr. at 23.) He has held this position for approximately eight years. (Tr. at 23, 96.)

### *1. Office of Declassification*

The Office of Declassification is responsible for drafting and interpreting the regulations promulgated under the Atomic Energy Act. (Tr. at 24-25.) The Atomic Energy Act requires the federal government to protect certain types of information pertaining to the production and safety of nuclear weapons and materials. (Tr. at 24, 42.) Classification authority is also derived from an Executive Order which sets forth standards for protecting "national security information." (Tr. at 42.) These policies and procedures are based upon the need to protect the security of the United States.<sup>123</sup> (Tr. at 38, 49-50.)

The Office of Declassification relies on sophisticated written classification guides and trained professionals<sup>124</sup> to determine what information is classified, or protected, and what information if not classified, or not protected. (Tr. at 24, 41.) Such determinations are based on the subject matter and are difficult to make. (Tr. at 42, 161-62.) Congress allocates approximately \$15,000,000 to \$20,000,000 per year to the Office of Declassification to ensure the proper classification of information. (Tr. at 50.)

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According to Mr. Siebert, the Office of Declassification exists so that individuals having access to classified information are not making their own, individual judgments as to what information may be disclosed to the public. (Tr. at 164.) Without a uniform classification system, the government would lose control over information that could potentially damage our national security. (Tr. at 164.)

#### *a. Classification Officers*

Classification officers are responsible for identifying classified information, and often review sensitive matters that would be of interest to other people in the DOE. (Tr. at 45-46, 50, 52.) Nonetheless, they do not make judgments about the veracity of the information contained in these documents. (Tr. at 45-46, 51.) Mr. Siebert explained that one of their goals is to develop trustworthy relationships with the people seeking classification review. (Tr. at 52.) If classification officers made judgments about the contents of documents they review, individuals would become less inclined to bring sensitive information to them in the future. (Tr. at 51-52.) Consequently, classification officers do not disseminate the substantive matters contained in documents that they review. (Tr. at 52.)

#### *b. Interrelationship with RFETS*

Highly sophisticated technology and special nuclear materials are stored at RFETS. (Tr. at 164.) As such, RFETS is a major point in our nuclear weapons chain. (Tr. at 164.)

The Office of Declassification is responsible for overseeing classification policy matters at RFETS. (Tr. at 26, 100.) Moreover, the Office of Declassification reviews the qualifications of field classification officers prior to their appointment, and conducts performance appraisals for DOE employees at RFETS. (Tr. at 26, 100-01.)

The administrative oversight rests with Rod Hoffman, an on-site federal classification officer.<sup>125</sup> (Tr. at 27, 30.) Mr. Hoffman is the principal authority for classification at the site. (Tr. at 28-29.) As such, he is responsible for managing and evaluating the contractors performance as it pertains to compliance with the classification policies and procedures. (Tr. at 28-30.)

Worldwide Security is the subcontractor that operates the Classification Office at RFETS.<sup>126</sup> (Tr. at 91.) Steven Cunningham manages this Classification Office. (Tr. at 91.) Mr. Hoffman supervises and evaluates Worldwide Security's performance. (Tr. at 91-92.) In short, Mr. Hoffman is responsible for ensuring that the contractors, such as Worldwide Security, properly implement the DOE classification regulations at RFETS. (Tr. at 92.)

If an employee in the subcontractor's Classification Office has a policy question, the employee may either inquire within their own office or contact Mr. Hoffman directly. (Tr. at 27, 29.) If Mr. Hoffman has a question about classification policy, he generally contacts the Office of Declassification for assistance. (Tr. at 30.)

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During Mr. Hoffman's tenure, there have been some deficiencies in the management of the classification functions at RFETS. (Tr. at 93-95, 97.) Nonetheless, the deficiencies have not been of the magnitude to warrant Mr. Hoffman's removal. (Tr. at 97, 101.) In response to a question about whether Mr. Hoffman oversees Worldwide Security on a "daily" basis, Mr. Siebert explained that Mr. Hoffman has physical disabilities that may limit his ability to be physically present at Worldwide Security on a daily basis. (Tr. at 93-94.)

*c. Authorized Derivative Classifiers*

An authorized derivative classifier ("ADC") is a person that has been trained and licensed to determine whether or not particular information is classified. (Tr. at 48, 87.) An ADC training is limited to particular areas or subject matters. (Tr. at 87.) Therefore, an ADC may be unfamiliar with all of the classification rules that are applicable in a given situation. (Tr. at 87, 88.)

Furthermore, ADC's generally perform classification duties on a part-time basis. (Tr. at 163.) In contrast, classification officers work full-time on classification issues. (Tr. at 163.) Thus, an ADC's authority is limited to classifying information. (Tr. at 48.) They are not authorized to declassify information. (Tr. at 48.)

Thus, even though an employee is an ADC, he is still bound by the classification review requirements set forth in DOE Order No. 5650.2B. (Tr. at 48, 85; CX-20.) In other words, prior to making a public disclosure, an ADC is required to have Category II and Category III information reviewed by the contractor Classification Office or the federal Classification Office at the site. (Tr. at 48-49, 85; CX-139 at 92-93. See also RX-A; CX- 20.)

## 2. DOE Order No. 5650.2B

The Office of Declassification is responsible for interpreting the classification policies and procedures prescribed in DOE Order No. 5650.2B. (Tr. at 25-26; CX-20.) DOE Order No. 5650.2B sets forth the procedures for classification review of all newly generated documents.<sup>127</sup> (Tr. 33; CX-20. See also RX- A.) The underlying policy is to prevent or reduce the likelihood that classified information will be inadvertently released during written and oral communications. (Tr. at 122.)

Mr. Siebert defined the term "newly generated document" as a document that "has the potential of having classification matters associated with it, but has not previously been reviewed." (Tr. at 33.) The term "generated" refers to a document in which the information, or the format in which the information is presented, is either "newly made" or "newly produced." (Tr. at 132.) In other words, once an authoritative analysis has been conducted for a particular document, a full review is only required when the

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subsequent disclosure falls outside the parameters of the initial disclosure. (Tr. at 33, 128-130.) These procedures extend to "any applicable oral presentations, including speeches, briefings, or interviews to be made by DOE or DOE contractor personnel."<sup>128</sup> (Tr. at 34-35, 121, 126; CX-20 at MG2475.)

Mr. Siebert further opined that taking information out of a declassified document and disclosing it to the media in an oral interview, could create a "newly generated document," depending upon the contents of the media interview. (Tr. at 133-34, 165.) The context of an oral interview, for example, could go beyond the declassified information contained in the initial document. (Tr. at 134, 165.)

Mr. Siebert also reviewed the provisions contained at subsection 2(c) and the definitions contained at Chapter I, Section 2(o). (Tr. at 35-36, 38-40; CX-20 at 2; RX-A.) The term "potential" as used in the classification potential categories means that there is a possibility that sensitive information may be disclosed in the course of the activity. (Tr. at

44-45; RX-A.) According to Mr. Siebert, the distinction between the categories is based on the "possibility" or "potential" for the inadvertent release of classified information, not the "actual" release of classified information. (Tr. at 77. See also RX-A.)

*a. Category I Activities*

Category I activities have "virtually no potential for using or generating classified information," and are not subject to the classification review requirements set forth in DOE Order No. 5650.2B (V)(G). (RX-A; CX-20; CX-139 at 99-104.) In response to a question pertaining to the disclosure of Category I information, Mr. Siebert stated:

If the person was absolutely certain there was nothing to do with classified information, and they were willing to stake the possibility of a security violation on that, because if they are wrong, they will get a security violation, then, the Classification Office can't force them to [seek their guidance before making the disclosure]. [Nevertheless,] [a] responsible person, it seems to me, when you get into a sensitive area like [safeguards and security concerns,] would seek the guidance that's offered by the Classification Office.

(Tr. at 75-77; CX-139 at 109-110.)

Mr. Siebert further opined that an individual with a "Q" security clearance could tell a journalist that, "I don't think Rocky Flats is adequately protecting plutonium," without seeking the guidance of the Classification Office. (CX-139 at 99-104.) He explained that this would be a Category I activity, provided that the individual does not make any additional remarks. (CX-139 at 99-104.)

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Likewise, Mr. Siebert opined that cleared individuals are not expected to go through classification review before discussing an unclassified subject with their uncleared spouses. (Tr. at 86.) Nonetheless, persons with security clearances must be careful not to disclose classified information to their uncleared spouses during the course of normal marital relations. (Tr. at 84-86; CX-139 at 91-92.)

In contrast, if there is the possibility of generating Category II information, the individual is responsible for having the Classification Office review the material prior to participating in the activity. (Tr. at 78.) If the individual fails to follow the classification review procedure and inadvertently discloses classified information, the person will be issued a security violation by the Office of Safeguards and Security.<sup>129</sup> (Tr. at 78-79; CX-110.)

*b. Category II and Category III Activities*



The responsibility for determining whether information has the potential of falling within the definition of Category II, and is therefore subject to classification review, rests with the person that is generating or using the information. (Tr. at 40-41, 87.) Such persons usually have received technical training and have obtained classification clearances. (Tr. at 40-41, 84, 87.) Cleared individuals also have access to written classification guides which they should consult prior to making judgments as to whether the information is sensitive or not. (CX-139 at 93-94.) Nevertheless, the training that is provided does not exempt these individuals from the classification review procedures in DOE Order No. 5650.2B.<sup>130</sup> (Tr. at 84-85; CX-139 at 93-94. See also CX-20.)

Individuals are trained on how to identify the differences between Category I, II, and III activities.<sup>131</sup> (Tr. at 118.) Nevertheless, Mr. Siebert declined to speculate on the effectiveness of this training. (Tr. at 119.) The Department also provides checklists that address the risks associated with oral presentations and testimony. (Tr. at 118.)

*c. Releasing Information to the Media*

Mr. Siebert was asked to respond to a series of hypothetical questions. His responses are summarized below.

Contractor personnel wishing to disclose Category II or Category III information to the media are subject to the provisions set forth in DOE Order No. 5650.2B. (Tr. at 37, 52-53, 131; CX-20.) He explained that employees, including whistleblowers, should have Category II and Category III information reviewed by the Classification Office prior to making public disclosures. (Tr. at 37-38.) This policy is based upon the need to avoid the inadvertent release of classified information. (Tr. at 38.)

A media interview of a DOE contractor employee concerning security at RFETS would have the potential for using or generating classified information (i.e., Category II information). (Tr. at 47; RX-A.) Therefore, if a DOE contractor employee wanted to participate in a media interview relating to the security at RFETS, he would be required to go to the Classification Office before participating in the interview. (Tr. at 47.)

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If Complainant wanted to disclose information to the media pertaining to the current inadequacies or adequacies of security guard training at RFETS, such information would clearly fall within the definitions of Category II or Category III activities. (Tr. at 54, 166-67.) Consequently, Complainant would be required to have the Classification Office review the information prior to making the disclosure. (Tr. at 54, 166-67.) Failure to do so could result in an inadvertent release of classified information. (Tr. at 54.)

Mr. Siebert testified that a whistleblower's obligation to follow the classification review procedures is not excused even if the whistleblower perceives the classification officers

as being untrustworthy. (Tr. at 60-61.) He reasoned that employees have an over-arching responsibility to protect national security. (Tr. at 60-61.)

*d. Releasing Information to Congress*

Policies pertaining to the disclosure of classified information to Congress may be different than the policies pertaining to the disclosure of potentially classified information to the media. (Tr. at 57-59.) The Atomic Energy Act authorizes the DOE to grant certain congresspeople access to classified information without conducting full background investigations. (Tr. at 57-59.) Nonetheless, this special provision does not apply to congressional aides or staff members. (Tr. at 57-59.)

Therefore, a prudent person with access to classified information would participate in a classification review prior to making disclosures of potentially classified information to an uncleared congressman. (Tr. at 59-60.) Mr. Siebert reasoned that even if the disclosure is directed to a particular set of congresspeople, congressional staff members may also be present. (Tr. at 60.)

*e. Disclosing Information at Depositions*

Similarly, individuals testifying at depositions and public hearings that have the potential for using or generating classified information (i.e., a Category II activity) should comply with the classification review procedures. (Tr. at 117.) Mr. Siebert opined that a prudent person would also request that a classification officer accompany him to any depositions or public hearings in which he was testifying. (Tr. at 113.) He reasoned that having a classification expert present at a deposition, for example, would assist him in identifying and avoiding sensitive matters. (Tr. at 115-16.) Nevertheless, an individual's failure to request that a classification officer accompany him to a deposition or formal hearing would not be a violation of DOE Order No. 5650.2B. (Tr. at 113, 116. See also CX-20.)

*f. Complainant's Exhibits*

*(1) "White Paper" (CX- 117)*

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On cross-examination, Complainant's counsel tried to elicit testimony concerning a "white paper" which was introduced into evidence as Complainant's Exhibit 117. (Tr. at 90-110.) However, Mr. Siebert testified that neither he nor the Office of Declassification had prepared or approved this document. (Tr. at 90.) Furthermore, Mr. Siebert was not aware of this document's existence until Complainant's counsel showed it to him during his deposition on February 25, 1999. (Tr. at 90; CX-139 at 74, 76.)

Nevertheless, Mr. Siebert opined that an individual may express his "personal opinion" about a subject that has no possibility of generating classified information (i.e., Category I information), without seeking classification review. (Tr. at 102.)

*(2) Status of Safeguards and Security for 1996 (CX-1)*

Complainant's counsel also tried to elicit testimony concerning the "Status of Safeguards and Security for 1996" which was introduced into evidence as Complainant's Exhibit 1. (Tr. at 138-50.) This document was prepared by the Office of Safeguards and Security, not the Office of Declassification. (Tr. at 144; CX-1 at MG2255.) As such, Mr. Siebert did not have the expertise to testify as to the analysis and assessments contained within this report. (Tr. at 144-48.)

*(3) Letter from David E. Ridenour (CX- 138)*

Finally, Complainant's counsel tried to elicit testimony about a letter written by David E. Ridenour, which was introduced into evidence as Complainant's Exhibit 138. (Tr. at 151-53.) However, counsel was unable to lay the proper foundation for this testimony. (Tr. at 151- 53.)

*3. Former Employees*

On cross-examination, Mr. Siebert was asked whether the DOE has any basis for declining to review documents that are in the personal possession of a former DOE contractor employee. (Tr. at 157.) Mr. Siebert testified that, in accordance with DOE policy, the Office of Declassification does not review documents or audiotapes that are beyond the control of the DOE and have already been compromised.<sup>132</sup> (Tr. at 157-58.) The underlying principle is that the DOE should not provide uncleared individuals with the knowledge as to whether or not they are in possession of classified information.<sup>133</sup> (Tr. at 157-58.)

The above-mentioned policy is not set forth in DOE Order No. 5650.2B. (Tr. at 158. See also CX-20.) Mr. Siebert testified that even though DOE Order No. 5650.2B requires individuals that no longer have security clearances to submit documents to the Classification Office for review, the DOE has additional policies pertaining to the review of compromised materials. (Tr. at 160; CX-20.)

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**O. Exhibits: Complainant's Employment History and Training**

*1. Education*

Complainant has a high school diploma and approximately one and one-half years of college education from the University of Colorado at Denver.<sup>134</sup> (CX-14 at W0104.) He

also attended Regis College in 1988.<sup>135</sup> (CX-14 at W0107.) Complainant does not have a college degree. (CX-14.)

## 2. Employment History

Prior to joining RFETS, Complainant was employed as a welding repair technician, a logistics and fleet manager, an electro mechanical wiring technician, and an air balance technician. (CX-14 at W0105, W0107-0109.) On June 7, 1982, Rockwell International hired Complainant for a drafter position in the Facilities Engineering and Construction Division. (CX-14 at W0107.) In June 1984, Complainant assumed the position of security inspector for the Plant Protection/Protective Force Operation. (CX-14 at W0107.) In August 1985, he began serving as a security dispatcher. In August 1989, Complainant assumed the position of communications officer/investigator. (CX-14 at W0107.) His employment was eventually transferred from Rockwell to EG&G. (CX-15 at W0121.)

On September 10, 1990, Complainant's employment as a CAS Lieutenant was transferred to Respondent. (CX-15 at W0140; CX-16.) On or about April 20, 1992, Complainant was certified as an ADC. (CX-27.)

## 3. Compensation

Complainant received merit increases in compensation on September 28, 1992, December 23, 1993, October 3, 1994, December 7, 1995, December 19, 1996, and December 18, 1997. (CX-2, 15.)

In March 1995, Respondent received DOE approval to change its compensation system for "top level operations exempt personnel from a base plus overtime to an annual salary." (CX-15 at W0132.) Effective March 20, 1995, Complainant's annual salary was adjusted from \$44,279 to \$68,692. (CX-15 at W0130.) Respondent implemented further changes in its payroll system on or about July 1, 1995, and April 29, 1996. (CX-15 at W0131; CX- 83.)

## 4. Job Performance

During his tenure at RFETS, Complainant has consistently received positive performance appraisals. (See CX-2, 13.) During 1991 to 1994, employee performance was rated on the following scale: unacceptable, needs improvement, competent, commendable, and distinguishable. (CX-2.) Beginning in 1995, Complainant's performance was rated on the following scale: requires improvement, meets standards, and exceeds standards. (CX-2, 13.)

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On September 27, 1991, and January 25, 1993, Complainant's performance of specific job skills was rated "competent" to "distinguishable," and his overall performance was

rated "competent." CX-2 at W0153-0154. See also CX-130.) On October 28, 1993, and June 21, 1994, Complainant's performance of specific jobs skills was rated "commendable" to "distinguishable," and his overall performance was rated "commendable." (CX-2 at W0143-0146, W0150-0152. See also CX-130.) In November 1995, June 1996, and June 1997, Complainant's specific job skill ratings ranged from "meets standards" to "exceeds standards," and his overall performance ratings were "exceeds standards." (CX-2 at MG0097-0099, MG0100-0102; CX-13.)

On October 8, 1997, Mr. Leach wrote a memorandum to Gary Cupp, manager of CAS Operations, extolling Complainant's and Mr. Angelo's job performance. (CX-2 at MG0096; CX-13, 102.) Therein, Mr. Leach opines that Complainant and Mr. Angelo are "more than capable of fulfilling the responsibilities of any Lieutenant [sic] position and/or that of Acting Captain [sic]." (CX-2 at MG0096; CX-13, 102.)

In addition, Complainant received letters of commendation on December 19, 1989, May 2, 1990, May 3, 1990, February 14, 1991, April 6, 1993, April 13, 1993, December 14, 1993, April 4, 1994, October 17, 1996,<sup>136</sup> and June 24, 1997. (CX-2, 90-91, 98. See also CX-130.)

## **P. Exhibits: Classification Policies and Procedures**

### **1. EG&G Classification and UCNI Fact Sheet**

The EG&G Classification and UCNI Fact Sheet provides, among other things, that any documents suspected of containing classified matter and intended for public release must be reviewed by the Classification Office staff.<sup>137</sup> (CX-8 at MG1934.) The responsibility rests with the person originating the document. (CX-8 at MG1934.)

### **2. EG&G Policy No. 2-9, Revision 1**

On September 30, 1992, EG&G adopted Policy No. 2-9 pertaining to the public release of information. (CX-40; RX-B.) This policy provides in part:

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EG&G will respect the right of employees to express individual opinions on public issues, and there is no intention on the part of plant management to influence or control the relationship of Rocky Flats personnel as individuals with the news media or the public. When an employee does express an individual opinion, it should be clear to the audience that the employee is speaking as an individual and not as a Corporate or Plant representative (or spokesperson). . . .

SCOPE:

1. All public statements, written, oral, voluntary, or solicited, that may tend to imply through use of . . . organization title, inference, or otherwise that such statement is authorized by, or reflects, the official position of the Corporation,

require advance approval. Public statements include, but are not limited to . . . news releases, radio or television appearances, responses to questions from news media . . .

....

ACTION REQUIRED:

....

5. All information for public release must be reviewed by a representative of the Classification Office.

(CX-40; RX-B. See also Tr. at 848, 863-64.)

### 3. Kaiser-Hill Directive CAHW-001-96

On March 28, 1996, Kaiser-Hill adopted Directive CAHW-001-96 which pertains to the release of information and documents. (CX-80.) It provides in part:

When materials are to be released to an agency or company not contractually related to the Kaiser-Hill Team (for example: the media [and] Defense Nuclear Facility Safety . . .), prior approval from the Contractor Classification Office is required. ADCs are not authorized to approve information for release to the general public.

(CX-80.)

### 4. Respondent's Security Manual

Chapter 6 of Respondent's Security Manual sets forth the requirements for properly identifying, protecting, and controlling sensitive and classified information to ensure compliance with the Atomic Energy Act of 1954, as amended, DOE Order No. 5650.2B, as well as other specified orders.<sup>138</sup> (CX-88 at MG2481. See also CX-12 at W0288.) This document became effective on August 9, 1996, and provides in part:

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1. Document originators are responsible for ensuring information is properly reviewed for classification and UCNI.

i. An ADC shall be consulted for a classification review when matter is believed to be classified or where doubt exists as to the classification level of matter.

....

Authorized Derivative Classifier

2. The ADC shall determine the classification level and category in accordance with existing guidance or source documents.

....

Employee Responsibility

3. Employees shall ensure that all matter that is to be released to the public receives prior review and approval from the Rocky Flats Contractor Classification Office.

(CX-88 at MG2489-2490. See also CX-12 at W0296-0297.)

5. DOE Order No. 5650.2B

Chapter V, Part G of DOE Order No. 5650.2B sets forth the procedures for classification review of all newly generated documents and provides in pertinent part:

2. DOCUMENTS ORIGINATED BY DEPARTMENTAL ELEMENTS OR DEPARTMENTAL CONTRACTOR PERSONNEL. These procedures apply to all documents originated by DOE or DOE contractor personnel who possess valid security clearances. . . .

. . . .  
c. Documents Intended for Widespread Distribution or Public Release. A DOE or DOE contractor classification office or SA-20<sup>139</sup> must review all documents regardless of format, that concern Category II, Category III,<sup>140</sup> or other classified program areas and are intended for public release or such widespread internal distribution that public release is likely. Heads of HQ and Field Elements may delegate this authority to specified Authorized Classifiers. Formal reports, journal articles, press releases, speeches, and conference papers are examples of this type of document.

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d. Oral Presentations. The review requirements described in subparagraphs a, b, and c, above, are also applicable to any oral presentations, including speeches, briefings, or interviews, to be made by DOE or DOE contractor personnel. Whenever possible, the speakers should use prepared texts, reviewed in accordance with the requirements outlined above. When such prior review is not possible, or when extemporaneous remarks are likely, local DOE or DOE contractor classification office representatives will prebrief the speaker on classification guidance pertinent to the presentation subject matter, including danger areas in post-presentation discussions.

3. DOCUMENTS ORIGINATED BY OTHER THAN DEPARTMENTAL ELEMENTS OR DEPARTMENTAL PERSONNEL. The following procedures apply to documents submitted by other than DOE or DOE contractor personnel with (a) active DOE or other Government agency security clearances, (b) inactive security clearances issued by DOE or other Government agencies, or (c) no security clearance.

a. Documents written by persons with active security clearances are subject to the requirements described in paragraph 2, above. The local DOE and DOE contractor classification office or SA-20 will conduct the classification review and will request that any classified or unclassified but controlled information be removed from the document prior to its unclassified publication.



b. Documents written by persons who have had but no longer have a security clearance will normally be treated as outlined in subparagraph 3a, above, unless the document deals with information to which the author previously was not authorized access. Those cases will be referred to SA-20.

(CX-20.)<sup>141</sup>

#### 6. Long & Jaudon Letter

On or about October 23, 1996, an attorney with Long & Jaudon transmitted correspondence to other attorneys involved in the matter of Woods v. Wackenhut Svcs., Inc. (CX-92.) The letter concerns the production of documents and tapes by Jeffrey B. Peters, and provides in part:

. . . I am authorized to relay that both Wackenhut and the Department of Energy have 'no comment' on the classification status of any documents or tapes in Mr. Peters' possession.

While much of the material may involve national security information, the Department of Energy is assuming that any documents that were formerly in Wackenhut's possession have been properly reviewed for classification purposes. Further, the Department of Energy declines to get involved in reviewing any documents or tapes which Mr. Peters has in his personal possession. The responsibility rests with Mr. Peters to assure that no classified information is revealed.

(CX-92.)

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#### 7. Classification Office White Paper

On December 17, 1997, the Contractor Classification Office Manager Steve Cunningham issued a Classification Office White Paper concerning the "freedom of speech." (CX-117.) The White Paper provides in part:

No one is permitted to disclose properly classified information; and unless empowered to speak officially on behalf of an agency, no one is permitted to represent the government in conveying official information to the media. . . .

. . . [T]he local classification office has purview over information release if the information is related to the government facility and operations covered by that classification office. Individuals planning to convey that information to the public must have that information reviewed per DOE Order 5650.2B, Ch. 5, Part G, 2.c. .

. . .  
However, when individuals are expressing their personal opinion, [sic] as entitled under their Constitutional Rights, they may do so without interference

from classification authorities, provided no classified or sensitive information is to be expressed. It also must be made EXPLICITLY CLEAR by the individuals that they are expressing an INDIVIDUAL opinion, and are not speaking on behalf of any agency. Individuals must also attempt to ensure they are not portrayed by the media as speaking officially through conveyance of title, manner of dress, backdrop, introduction, or any other means of implication. . . .

At Rocky Flats, this delicate balance of information control has been covered in the past by a policy statement (EG&G 2-9) and is practiced by the Contractor Classification Office. It is recognized that many individuals speaking personal opinions do not seek contact with the Contractor Classification Office in advance.

(CX-117.)

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### **Q. Exhibits: Other Policies and Procedures**

#### **1. Administrative Discipline Policy**

On January 8, 1991, Respondent enacted an Administrative Discipline policy to ensure that work rule infractions or misconduct were timely and equitably administered and were proportionate to the offense. (CX-17 at MG2779.) This progressive discipline policy requires management to consider mitigating circumstances when determining the appropriate level of discipline. (CX-17 at MG2779-2780.) Work rule 39 was defined as a "[v]iolation of a safety rule or safety practice." (CX-17 at MG2786. See also CX-100.)

#### **2. DOE Contractor Employee Protection Program**

On May 1, 1992, the DOE issued a "Notice to Employees" concerning the implementation of the Contractor Employee Protection Program to serve contractor and subcontractor employees that believe they have suffered reprisal after engaging in protected activities. (CX-28 at W0100.) A similar notice was apparently posted on Respondent's bulletin boards on or about November 20, 1995. (CX-28 at W0101.)

#### **3. Positive Corrective Action**

On March 20, 1995, Respondent implemented a Positive Corrective Action program that "provides, where appropriate, a progressive series of steps when performance problems arise." (CX-65.) Mitigating and aggravating circumstances may be considered in determining the appropriate level of corrective action. (CX-65.)

#### **4. Kaiser-Hill Personnel Security Assurance Program**

Kaiser-Hill's Personnel Security Assurance Program ("PSAP"), as revised on July 29, 1996, sets forth the policies and procedures for all site employees, supervisors, and managers that have access to classified matter or significant quantities of special nuclear

material. (RX-D.) Candidates for PSAP positions must consent to psychological, medical, and background evaluations. (RX-D.) PSAP participants are required to submit to annual comprehensive medical examinations and psychological or psychiatric evaluations. (RX-D.) Based upon the recommendation of a physician from the Site Occupational Medical Department, a temporary reassignment or restriction may be placed on a PSAP position if security concerns are observed. (RX-D.)

#### *5. Kaiser-Hill Team Standards of Conduct*

In September 1997, the Kaiser-Hill Team issued a revised brochure which sets forth the "common Standards of Conduct for employees of Kaiser-Hill, LLC; . . . and Wackenhut Services, LLC." (CX-100.) This document provides in part:

Unacceptable employee conduct includes but is not limited to the following:

. . . .

15) Unauthorized distribution of written or printed material of any description, including computer links and/or electronic mail on Company premises.

. . . .

38) Violation of a safety rule, procedure, regulation, order or any applicable safety practice either by committing a wrongful act or failure to act or report. Falsifying documents, gross negligence, willful disobedience, or engaging in such activity represents endangerment to human life or risking serious bodily injury.

39) Violation of a safety rule or safety practice.

(CX-100. See also CX-17.)

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### **R. Exhibits: Complainant's Safety and Security Concerns**

#### *1. Classified Document*

On January 15, 1996, Mr. Gillison requested that Mr. Peters place his security concerns in writing. (CX-131.) On February 5, 1996, Mr. Peters and Complainant generated a classified document detailing their perceived security concerns. (CX-131.) Said document was addressed to Mr. Gillison and titled "Security Concerns at Rocky Flats." (CX-131.)

#### *2. Defense Nuclear Facility Safety Board*

On September 26, 1996, Complainant sent a letter to the Defense Nuclear Facility Safety Board ("DNFSB") concerning security issues at RFETS. (CX-96.) Therein, he opined that the DOE investigation was incomplete, the DOE report contained misrepresentations, and the conditions at RFETS had continued to decline. (CX-96.)

#### *3. Denver Post Article*

On May 20, 1997, the Denver Post printed an article concerning safety and security at RFETS.<sup>142</sup> (CX- 97.) Complainant reportedly told the Denver Post that "DOE officials went to his house, erased the [Skaggs] letter file on his computer and took his printer ribbon, claiming the letter contained classified information."<sup>143</sup> (CX-97.) He also commented on the risk of nuclear materials "getting into the wrong hands." (CX-97.) Additional information is attributed to Messrs. Cosgrove, Peters, and Ridenour.<sup>144</sup> (CX-97.)

#### 4. CBS News Press Release

On October 28, 1997, CBS News issued a press release titled "SECURITY OFFICER REVEALS POTENTIAL ACCESS FOR TERRORISTS AT AMERICA'S LARGEST NUCLEAR WEAPONS STORAGE SITE, IN AN EXCLUSIVE INTERVIEW ON 'PUBLIC EYE WITH BRYANT GUMBEL,' OCT. 29." (CX-109.) The press release provides in part:

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For the first time on national television, Rocky Flats Security Force Lt. Mark Graff [sic] reveals that government safety tests at the country's largest former nuclear weapons plant are serious safety flaws. . . Senior investigative correspondent Rita Braver . . . learns that in the most recent computer tests of Rocky Flat's security plan, terrorists succeeded in seizing plutonium 100 percent of the time.

. . . .  
Graff [sic] tells PUBLIC EYE that Rocky Flats security passed a government security test because 'everyone knew the attack was coming.' He explains, "Yes, Rocky flats won. If I tell you that I'm going to hit you in the jaw in the next five minutes, for the next five minutes you're going to be extremely alert.' Graff [sic] confirms that he participated in numerous other security tests in which he played the role of a terrorist and successfully broke into the complex.

(CX-109.)

#### 5. CBS Evening News Broadcast

On November 24, 1997, CBS Evening News broadcasted the first of a two-part series on security at RFETS, which included the following report by Rita Braver:

Could terrorists get their hands on nuclear weapons material at this site? The government ran this exercise at Rocky Flats to answer that question. Rocky Flats security manager Mike Cosgrove [] was happy with the result.  
Mike Cosgrove (Security Manager, Rocky Flats Nuclear Weapons Plant): The bottom line is the adversaries were defeated. Initially, in regards to the initial engagement, they were not able to even come close to removing plutonium or special nuclear material from this site.

Braver: Not quite so, says Lt. Mark Graf [], and he's one of their own, a member of the Rocky Flats security force who says everyone knew the attack was coming. Lt. Mark Graf (Security, Rocky Flats Nuclear Weapons Plant): Yes, Rocky Flats won. If I tell you that I'm going to hit you in the jaw in the next five minutes, for the next five minutes, you're going to be extremely alert.

Braver: Are you saying this was staged?

Graf: It was scripted.

(CX-116 at MG2224; RX-C.) The second segment was broadcast on November 25, 1997. (CX-116; RX-C.)

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## **S. Exhibits: Site Safety and Security Reports**

### *1. Review of Issues Raised in Memorandum*

On or about March 29, 1996, Mr. Gillison directed Messrs. Anderson, Gross, Isom, and Wood to review the issues raised in Complainant's and Mr. Peters' memorandum to Mr. Gillison titled "Security Concerns at Rocky Flats," dated February 5, 1996. (CX-87; CX-131 at W0202. See also CX-131 at W0199; RX-E.) On May 10, 1996, the results of the review were presented to the Kaiser-Hill Verification Board. (CX-131 at W0199.) On July 11, 1996, Mr. Gillison requested that the Kaiser-Hill Verification Board reconvene to review and validate Respondent's report. (CX-87. See also CX-84, 99; RX-E.)

### *2. DOE Investigation*

DOE officials, Donald J. Solich and Edmund A. Szymanski, conducted an investigation into the allegations raised in the letter to Congressman Skaggs dated December 8, 1995.<sup>145</sup> (CX-76.) On February 5, 1996, an investigative report was transmitted Mark N. Silverman, DOE manager at RFETS. (CX- 76.) The report provides in part:

Thirty-eight individuals, knowledgeable of the facts and circumstances surrounding the movement and temporary storage of special nuclear material (SNM) in Room 3337, Building 371 were interviewed and substantial documentation was reviewed by the team.

....

A detailed study of the attached Review of Allegations determined that some of Mr. Peters' allegations were partially correct. In most cases, however, the team ascertained that Mr. Peters' allegations were based on incomplete information and could not be substantiated.

... The division of roles within WSI contributed to the allegations raised by Mr. Peters. He contends that he was not informed of certain issues, when, in actuality, these issues were the responsibility of another group(s).

CX-76 at W0004-0006.)

### 3. Status of Safeguards and Security

In January 1997, the DOE issued a report titled "Status of Safeguards and Security for 1996." (CX-1. See also CX-71.) This report provides a comprehensive review of the safeguards and security programs at nuclear and non-nuclear facilities. (CX-1.) Therein, RFETS received a "marginal" facility rating while the majority of nuclear facilities received "satisfactory" ratings.<sup>146</sup> (CX-1 at MG2264.)

In April 1997, the DOE issued the "22nd Annual Report to the President on the Status of Safeguards and Security at Domestic Nuclear Weapons Facilities" for the period January 1, 1996, through December 31, 1996. (CX-140. See also CX-141.) Again, RFETS received a "marginal" rating in safeguards and security.<sup>147</sup> (CX-140 at MG2605, MG2609-2611.)

Moreover, Respondent's Exhibit G contains a listing site reviews and ratings for the period June 1997 to February 1999. (RX-G.)

### 4. Congressional Inquiry

On October 14, 1997, Congressman Edward J. Markey sent a letter to the Secretary of Energy, Federico Pena, regarding the status of safeguards and security at DOE nuclear weapon facilities. (CX-103.) The letter references, among other things, the DOE report titled "Status of Safeguards and Security for 1996" and two Denver Post articles.<sup>148</sup> (CX-103.)

### 5. Skaggs Committee Report

Congressman Skaggs formed an independent review panel to examine the safeguard and security measures employed at RFETS. (RX-F.) On or about December 8, 1998, four panelists submitted independent reports to Congressman Skaggs. (RX-F.) Said reports set forth the concerns, observations, and recommendations of the panelists in an unclassified manner. (RX-F.)

## **T. Exhibits: Alleged Retaliation**

### 1. Central Alarm Station Assignments

On April 4, 1996, Joe Walsh sent a letter to Mr. Gillison concerning Complainant's job responsibilities, including shift assignments. (CX-144.) Mr. Walsh states, among other things, that Complainant will be assigned to fill the position vacated by Mr. Couper. (CX-144 at MG1108.) Mr. Walsh denies treating Complainant adversely, claims to be unaware of the letter to Congressman Skaggs, and explains that the reassignment is necessary due to a reduction-in-force. (CX-144.)

## 2. OPM/DOE Investigation

The Final Inquiry Report relative to Mr. Peters' whistleblower complaint provides in part.<sup>149</sup>

It appears a chilling effect may be created by WSI in that those who are supporting or interacting with Peters are now under investigation. Graf has been placed on the night shift in 12/95. Graf had not worked that shift in over three years and was put on the shift the end of 11/95 for a few days. He was told he would be returned to the day shift. However, after the Skaggs letter came out on 12/8/95, Graf was not reassigned to the day shift and had to work many double shifts throughout December. Graf worked a total of 262 hours in 12/95. He was eventually returned to the day shift in early 1/96, but was reassigned in early 4/96 to a line supervisory position and removed from his former duties which allowed access to the classified security information regarding SNM protection and movement.

(CX-86 at MG0518.) This document was dated June 6, 1996. (CX-86.)

## 3. Employee Bulletin

On February 11, 1997, Gail Bange posted an employee bulletin requesting that all document and deposition requests made by outside counsel be referred to the Human Resources Department. (CX-93.) Said bulletin was removed on February 18, 1997. (CX-93.)

## 4. Cosgrove Meeting on November 6, 1997

On November 6, 1997, Mr. Cosgrove held a meeting with Bud Isom, Gail Bange, and Complainant to discuss Complainant's disclosures to CBS News. (CX-112.) Mr. Cosgrove read a letter out loud and asked Complainant to respond to several questions in writing. (CX-112. See also CX-111.) Complainant complied with his request. (CX-112. See also CX-110.) During the meeting, Complainant said that he did not release any written documents to CBS News, and that some of the information attributed to him by CBS News was not entirely accurate. (CX-112.)

The information that Complainant disclosed to CBS News was not cleared for release by the Contractor Classification Office. (CX-112. See also CX-110, 111.) However, Complainant talked to Mr. Cunningham about the classification review process as it pertained to Mr. Peters. (CX-112.) According to Complainant, Mr. Cunningham indicated that the Contractor Classification Office did not want to review information that was in Mr. Peters' personal possession. (CX-112. See also CX-110, 111.)



### 5. Cosgrove Letter Re: Release of Information

On November 6, 1997, Mr. Cosgrove wrote a letter to Complainant concerning the potential release of classified information to CBS News personnel and other individuals. (CX- 111.) The letter provides in part:

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Your status as a WSLLC employee and uniformed supervisor, who maintains a 'Q' clearance and participates in the PSAP program, makes you a part of [Respondent's contractual] obligation and responsibility [to protect all classified matter]. I believe that status includes the duty to bring to my attention, or any other proper authority, any concerns regarding the security posture at RFETS. . . .  
. . . I am concerned that classified security information may have been disclosed to individuals who may not have been cleared or have a need to know based upon the information I have to date. I request that you provide me answers to the following questions:

- . . . .
3. Did you have reason to believe that the CBS news personnel or others were not cleared or would potentially broadcast classified information?
  4. Did you make the comments to CBS or others that are attributed to you in the attached CBS news release? (Why?)
  5. Did you release any potentially classified information?
  6. In your contact with the media, was any of the information you may have provided cleared for release by the RFETS Contractor Classification Office?
- . . . I request that you provide to me a copy of all documentation provided to CBS personnel or others . . . so that it can be reviewed for classification by the proper authorities.

(CX-111.)

### 6. Complainant's Handwritten Response

Complainant apparently responded in writing to the questions raised in Mr. Cosgrove's letter dated November 6, 1997. (CX-110.) His handwritten reply is undated. (CX-110. But see, CX-112.) Therein, Complainant states that he reviewed all of the information that he released for classification purposes. (CX-110 at W0216.) Complainant opined that, "as a subject matter expert, [he was] best suited to understand and classify this information." (CX- 110 at W0216.) He further replied that:

I have a memorandum stating that the information in Mr. Peters' position [sic] is his to release, protect, review [sic] (WSLLC did not want to have the information reviewed). I did discuss the process with Mr. S. Cunningham, and he implied that he wanted nothing to do with it. I also received guidance from other ADCs on specific classification points that I may not have been familiar with.

*7. Internal Investigation*

In late November or early December 1997, Respondent initiated an investigation into whether Complainant had released "classified, sensitive, or proprietary information" to the media.<sup>150</sup> (CX-119 at 1, 10.) On December 11, 1997, investigators Tom Horton and Stephanie Davis interviewed Mr. Cunningham about the classification review policies and whether Complainant had complied with said policies. (CX-119.) The investigators also interviewed Complainant's supervisors and several other persons thought to have information concerning Complainant's activities. (CX-119.)

On January 13, 1998, the investigators interviewed Complainant for approximately three hours.<sup>151</sup> (CX-118 at MG0373; CX-119 at 1, 11.) Complainant was questioned about what information he had provided to CBS News, Mr. Peters, and Ted Taylor; whether he had followed the appropriate classification review procedures; what his motivations were for making said disclosures; and whether he had made additional disclosures to the media or the government that had not yet surfaced or been published. (CX-118, 119.)

In response to questions pertaining to classification review, Complainant stated that he was aware of the policy requiring employees to obtain approval from the Classification Office prior to releasing information to the public or the media. (CX-119. See also CX-118.) He also conceded that, as part of his ADC training, he had been "advised of the correct and approved procedure for releasing information to the media." (CX-118 at MG0375. See also CX-119.) Nevertheless, Complainant chose not to follow the classification review procedure for three reasons. (CX-119 at 6; CX-118 at MG0375.) According to Complainant, the three reasons are as follows:

- [1.] I have a letter from Wackenhut stating that Mr. Peters' information is his own, and [he] is responsible for any classification review. Much of my information is concurrent<sup>152</sup> with Mr. Peters, and I took the letter to apply to that information as well.
- [2.] I had conversed with Steven Cunningham about a possible press release and he stated, maybe jokingly, that he wanted nothing to do with it.
- [3.] I did not want to expose any ADCs to possible repercussions for the release of information.<sup>153</sup>

(CX-118 at MG0375. See also CX-119 at 6.)

In addition, Complainant allegedly offered a fourth reason:

[4.] I have been the reviewer for previous pieces in depositions and arbitrations, information that is subject to public release.

(CX-118 at MG0375.) However, the Investigations Report made no reference to this particular assertion. (See CX-119.)

According to the Investigations Report, Complainant refused to answer two questions soliciting specific information about the content of his disclosures to CBS News.<sup>154</sup> (CX-119. See also CX-118, 120.) Complainant took the position that he was "best suited to make a classification determination about information associated with the interview" because of his training as an ADC and a subject matter expert ("SME"). (CX-118 at MG0373. See also CX-119 at 4.) According to Complainant, he did not disclose any classified information to CBS News, Mr. Peters, or Mr. Taylor. (CX-119, 118.)

In response to questions about his underlying motivation, Complainant expressed his desire to protect the nuclear materials, the facility, the workers, and the public. (CX- 119, 118.) He further opined that Respondent had not taken his security concerns seriously in the past. (CX-119, 118.)

A "WSLLC-RFETS Investigations Report" was issued on January 28, 1998.<sup>155</sup> (CX-119.) The investigation revealed that Complainant had knowledge of the classification review procedure, and that he did not comply with said procedure prior to making disclosures to CBS News representatives.<sup>156</sup> (CX-119. See also CX-118 at MG0375.) Investigators Horton and Davis identified three "possible violations," which are as follows:

- A. DOE Procedure 5650.2B, Ch. 5, Part G, 2.c.: A DOE or DOE contractor classification office . . . must review all documents, regardless of format . . . intended for public release.
- B. Kaiser Hill Standards of Conduct Rule 39: Violation of a security regulation or procedure.
- C. Kaiser Hill Standards of Conduct Rule 10: Any onsite or offsite conduct detrimental to the interest or reputation of the Company or the DOE[, including, but not limited to, conduct which results in the institution of criminal proceedings against an employee.]

(CX-119 at 1; CX-100. See also CX-20; CX-65 at 27, 30.)

#### 8. Cosgrove Meeting on January 28, 1998

On January 28, 1998, Mr. Cosgrove met with Complainant, Larry Barela, and Ms. Bange to discuss Complainant's failure to adequately respond to the investigators questions about the specific information that he disclosed to CBS News. (CX-120, 121.) Mr. Cosgrove informed Complainant that his refusal to fully cooperate with the internal

investigation could lead to discipline, up to, and including, termination. (CX-120.) After consulting with his attorney, Complainant complied with Mr. Cosgrove's request to write down all information that he shared with CBS, Mr. Peters, and the DNFSB. (CX-121; CX-120 at W0233.)

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Later, Mr. Cosgrove asked Complainant for his assurances that he would comply with all site rules and regulations in the future, while he was trying to resolve these issues. (CX-120 at W0233.) Complainant told Mr. Cosgrove that he would "consider it," but that he was very disturbed over the way things were being handled at RFETS. (CX-120 at W0233.)

Mr. Cosgrove also encouraged Complainant to work as a team player on the inside to help resolve his concerns. (CX-120 at W0234-0236.) The following conversation then occurred:<sup>157</sup>

Complainant: If I was in your chair right now I would be pulling my PSAP.

Cosgrove: That's what phase two is leading me to. I would like you to participate in the EAP program and I'd like you to do so voluntarily instead of being mandated. I will mandate it though if I have to. You are displaying behaviors that are contrary to those allowed in the PSAP program and that's a real concern for me and this company.

Complainant: I have no problem with that and would like to take myself there voluntarily. I would ask that the company help coordinate that process.

(CX-120 at W0234. See also CX-121.)

#### 9. Administrative Leave

On January 31, 1998, Complainant was placed on administrative leave with pay. (CX-122.) Complainant was also scheduled to meet with an Employee Assistance Program ("EAP") counselor. (CX-122.)

#### 10. Fitness for Duty Evaluation

On February 3, 1998, Complainant was voluntarily evaluated by Bryan Brook, Ph.D., at the Employee Assistance Program ("EAP"). (CX-13 at MG0107.) It was determined that a Fitness for Duty Evaluation and second opinion would be beneficial given Complainant's level of responsibility for site security and safety. (CX-13 at MG0107.) On February 4, 1998, F. J. Furman, M.D., recommended that Complainant be removed from his PSAP position pending further evaluation.<sup>158</sup> (CX-13 at MG0108.)

On February 16, 1998, John Nicolette, Ph.D., conducted psychological testing and assessment of Complainant. (CX-13 at MG0107. See also CX-123.) On February 27, 1998, Dr. Furman sent a letter to Respondent stating, among other things, that:

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Mr. Graf is considered fit for duty and suitable for return to work with the following recommendations:

- 1) A clarification session with supervisors to specify company guideposts on what is and is not permitted regarding the release of security information.
- 2) Employee Assistance Program counseling for Mark to deal with his frustrations and discouragement.
- 3) Removal from his position if he exhibits future areas of concern.

(CX-123 at MG0109.)

#### 11. Cosgrove Meeting on March 24, 1998

On March 24, 1998, Mr. Cosgrove, Complainant, Mr. Jamsay, and Ms. Bange met to discuss Complainant returning to work. (CX-126.) Mr. Cosgrove gave Complainant two pieces of correspondence to read before beginning the meeting. (CX-126 at W0194. See also CX-124, 125.)

It appears that Complainant explained that his decision not to go through the Classification Office was based on the opinion set forth in the Long & Jaudon letter. (See CX-126 at W0194, W0196; CX-92.) Mr. Cosgrove requested Complainant's assurances that he would comply with the site security policies and procedures in the future.<sup>159</sup> (CX-126 at W0194-0196.) He also told Complainant that future unauthorized releases would lead to further discipline, up to, and including, termination.<sup>160</sup> (CX-126 at W0194.) He explained that if Complainant refused to comply with the procedures then he would become a possible threat to the site. (CX-126 at W0195.)

Mr. Cosgrove told Complainant that he needed his signature on the Corrective Action Plan in order to proceed further. (CX-126 at W0196. See also CX-125.) Complainant said he would call Mr. Cosgrove later in the day. (CX-126 at W0196.)

#### 12. Threat of Disciplinary Suspension

On March 24, 1998, Mr. Cosgrove issued a memorandum to Complainant concerning the internal investigation concerning the "release of security related information to unauthorized persons." (CX-13 at MG0103; CX-124.) Mr. Cosgrove determined that Complainant had violated provision 6.2 of the PSAP Implementation Plan, and work rule 39.<sup>161</sup> Based upon these violations and Complainant's special training as an ADC, Mr. Cosgrove issued a one-day suspension without pay beginning March 25, 1998. (CX-13 at MG0103; CX-124.) Mr. Cosgrove stated that "[f]urther violations of this nature will lead

to your immediate termination." (CX-13 at MG0103; CX- 124.) This suspension was never implemented. (See Tr. at 897.)

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### *13. Corrective Action Plan*

Mr. Cosgrove also issued a Corrective Action Plan on March 24, 1998. (CX- 13 at MG0104; CX-125.) Therein, Mr. Cosgrove states that the Employee Assistance Program ("EAP") and subsequent psychological evaluation by Dr. Nicolletti have concluded that Complainant is fit to return to work. (CX-13 at MG0104; CX-125.) As such, Mr. Cosgrove set forth five specific guidelines that Complainant was expected to abide by, including,

2. As an Authorized Derivative Classifier, you above all others are aware of the procedures for releasing security information to the public and others as defined in the Rocky Flats Security Manual in Chapter 6. I must have your assurances that site security information is not divulged in any form to those individuals or organizations that do not have a need to know and/or do not have the appropriate clearances to include the media, former employees, etc.
3. I expect you to adhere to the chain of command in all issues that pertain to this company and the security of this site.

. . . .

5. In an effort to re-establish your credibility in this Organization [sic], and your smooth transition back into the workplace you are being placed on the day shift and will be working a normal AWS schedule. You will report directly to Mark Jamsay. Your progress will be monitored for a period of at least 60 days. At that time I will determine your capabilities to assume normal CAS Lieutenant duties. Failure to abide by the above stated conditions will result in further disciplinary action up to and including termination.

(CX-13 at MG0104-0105; CX-125.)

On March 24, 1998, Complainant signed the Corrective Action Plan. (CX-125 at MG0390.) However, Complainant's compliance was contingent upon the following addendum:

I reserve my right to make disclosures of violations or perceived violations of the Energy Reorganization Act and/or the Atomic Energy Act. I do not admit that I have acted improperly in the past and protest this discipline.

(CX-125 at MG0390.)

*14. Telephone Conversation on March 25, 1998*

On March 25, 1998, Complainant spoke with an unidentified representative from Respondent (presumably Ms. Bange) concerning the above-mentioned addendum to the Corrective Action Plan.<sup>162</sup> (CX-127.) Complainant allegedly refused to retract the addendum, and took the position that he had not violated the site classification policies and procedures in the past.<sup>163</sup> (CX-127.)

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*15. Continuation of Administrative Leave*

On March 26, 1998, Respondent issued a letter to Complainant stating that:

Due to conflicts in your return to work on March 24, 1998, you will remain on administrative leave with pay until further notice.

(CX-128.)

*16. Revised Corrective Action Plan*

On April 7, 1998, Mr. Cosgrove transmitted a revised Corrective Action Plan to Complainant. (CX-129 at MG0332-0333; CX-130 at MG0332-0333.) The revised Corrective Action Plan provides in part:

The following is an acknowledgment statement to be signed by you.  
It is imperative that I adhere to the prescribed company Standards of Conduct and its corresponding Work Rules along with the applicable RFETS rules and regulations.

I will adhere to the chain of command in all issues that pertain to this company and the security of this site.

I understand that Wackenhut is concerned about the improper disclosure of classified information. Accordingly, to work for Wackenhut at RFETS, I agree to abide by and comply with the following:

- PSAP Implementation Plan, particularly but not limited to Section 6.2
- Company Standards of Conduct in corresponding work rules
- Rocky Flats Security Manual, particularly but not limited to Chapter 6
- DOE Order 5650.2B, Chapter 5, Part G, 2.c and 2.d (12/31/91)
- K-H directive-CAHW-001-96 (3/28/96)
- Kaiser Hill Team Standards of Conduct, particularly but not limited to Sections 15, 38, and 39

I understand that it is the responsibility of each Wackenhut employee to ensure the proper release of information in accordance with applicable laws, DOE orders,



and company policies and that each employee must identify the necessity of acquiring classification and other reviews for documents they prepare.

I understand that such rules and regulations are not meant to, and do not, abridge any rights or remedies afforded to me under the Whistle Blower Statutes or other related Federal or State Laws.

....

Failure to abide by the above-stated conditions will result in further disciplinary action up to and including termination.

(CX-129 at MG0332-0333; CX-130 at MG0332-0333. See also RX-D; CX-12; CX-88; CX-20; RX-A; CX-80; CX-100.)

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On or about September 25, 1998, the parties signed a Temporary Return to Work Agreement which enabled Complainant to return to his position as a CAS Lieutenant while this matter was being litigated. (See CX-147.) Complainant testified that he returned to work on September 28, 1998. (Tr. at 632.)

#### *17. Cartoons*

Complainant's Exhibit 10 contains three cartoons. (CX-10.) First, there is a cartoon with a person's head in the ground. (CX-10 at MG0425.) The typed words "Graf's return main talk in Berlin" appear at the top of the cartoon, and the handwritten word "Kleo" appears on the person's back. (CX-10 at MG0425.) Second, a Drabble cartoon was altered to depict Complainant as a modest hero. (CX-10 at MG0426.) Third, there is a Ziggy cartoon that makes no apparent reference to Complainant and states, "Hi, I'm from the government and I'm here to help you!" (CX- 10 at MG0426.)

#### **U. Exhibits: Time Cards and Crew Sheets**

At the request of the undersigned administrative law judge, Respondent submitted payroll records evidencing the number of hours that Complainant, and persons performing comparable duties,<sup>164</sup> worked during the months of November 1995 through January 1996. (See Tr. at 697-701; 984-87; 1409- 10; RX-M.) Respondent's Exhibit M contains time cards and "plant protection assignment- duty reports," commonly known as "crew sheets," for Messrs. Angelo, Chamberlin, Couper, Cseh, Pomeroy, and Complainant. (See RX-M, pt. 1 at 1.)

The time cards indicate the days and number of hours that each employee reportedly worked during the pay periods ending November 3, 1995, through February 2, 1996. (RX-M.) The time cards for salaried employees, however, do not reflect the overtime hours worked.<sup>165</sup> (RX-M, pt. 1 at 7; Tr. at 986-87.) A pay element checklist describing the specific pay codes was also provided. (RX-M, pt. 1 at 3).

The crew sheets indicate the dates, times, and specific posts that the security officers were assigned to work during November 1995, December 1995, and January 1996. (RX-M, pt. 1 at 1.) The crew sheets are completed "for each shift working in 12-hour blocks Sunday through Saturday, including the 10-hour shift working Monday through Friday." (RX-M, pt. 1 at 1.) Hence, the crew sheets indicate the total number of shift hours worked by each lieutenant. (See RX-M, pt. 1 at 1.) Administrative hours worked are not reflected on the crew sheets. (RX-M, pt. 1 at 1; Tr. at 985.)

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The figures in the following table reflect the total number of shift hours that each lieutenant reportedly worked.

	<b>11/95</b>	<b>12/95</b>	<b>1/96</b>	<b>Total</b>
Angelo	109	171	173	453
Chamberlin	168	120	176	464
Couper	156	97	191	697
Cseh	156	156	180	492
Graf (Complainant)	12	175	23	210
Pomeroy	153	72	72	297

The figures in the following table reflect the total number of shift and administrative hours that each lieutenant reportedly worked.<sup>166</sup>

	<b>11/95</b>	<b>12/95</b>	<b>1/96</b>	<b>Total</b>
Angelo	125.0	232.5	205.5	563.0
Chamberlin	192.0	146.5	229.0	567.5
Couper	195.5	126.5	240.3	562.3
Cseh	208.5	192.0	221.5	622.0
Graf (Complainant)	135.3	227.5	105.2	468.0
Pomeroy	219.0	131.0	107.0	457.0

In addition, the crew sheets and time cards contained information pertaining to the quantity and duration of leave that each officer took during this three month period. (RX-M.) The figures in the following table reflect the number of days taken off by each officer, excluding regularly scheduled days off.<sup>167</sup> (RX- M.)

	<b>11/95</b>	<b>12/95</b>	<b>1/96</b>	<b>Total</b>
Angelo	9	1	0	10.0
Chamberlin	2	5	1.5	8.5
Couper	2	11	0	13.0
Cseh	2	2	0	4.0
Graf (Complainant)	4	0	8	12.0
Pomeroy	0	7	10	17.0

#### **V. Exhibits: Other Comparator Evidence**

On July 6, 1994, Ms. Bange transmitted correspondence to the DOE Chief Counsel's office concerning the current status of whistleblower claims and other legal matters. (CX-62.) Therein, Marilyn M. Mulhall was identified as having filed a formal whistleblower complaint. (CX-62.) Mark J. Jamsay, Jeffrey B. Peters, Timothy T. Powell, and James A. Vissar were identified as having filed informal whistleblower complaints. (CX-62.) Complainant's counsel also introduced a Salary Discipline Log, which was dated August 22, 1994. (CX-63, 64.)

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*1. William S. Armijo*

In June 1991, and August 1991, William S. Armijo expressed health and safety concerns to his supervisors. (CX-47.) On August 22, 1991, Mr. Armijo was responding to an intrusion alarm which was activated in a radiologically controlled area. (CX-18, 19, 47.) Mr. Armijo was concerned because he was not wearing the proper protective clothing. (CX-19, 47.) He contacted a supervisor and was told to enter the contaminated area without the proper protective clothing. (CX-19, 47.) Mr. Armijo followed those instructions. (CX-47.) On September 6, 1991, Respondent issued Mr. Armijo a fourteen-day suspension notice for failing to properly respond to the alarm on August 22, 1991. (CX-18, 47.)

On October 7, 1991, Mr. Armijo filed a whistleblower complaint with the DOE. (CX-19.) On November 26, 1991, Mr. Armijo wrote a memorandum to Robert Nelson, DOE site manager, in an apparent effort to settle his whistleblower complaint. (CX-19.)

On January 20, 1992, Mr. Armijo responded to an alarm and failed to assume his roof top position.<sup>168</sup> (CX-23, 47.) Following a disciplinary hearing, Mr. Armijo's employment was terminated on January 22, 1992. (CX-21, 22-23.) Respondent reasoned that Mr. Armijo had failed to follow site security procedures on August 22, 1991, and January 20, 1992. (CX-21, 22-23. See also CX-18.) In accordance with existing procedures, Mr. Armijo's "Q" level security clearance was terminated. (CX-47.)

In April 1992, Respondent entered into settlement negotiations with Mr. Armijo and the Union. (CX-25, 26, 47.) On April 30, 1992, Mr. Armijo's employment was reinstated due to a grievance settlement.<sup>169</sup> (CX-24, 29, 47.)

In May 1992, Mr. Armijo's character came into question as the result of a pre-employment check and background investigation. (CX-31; See also CX-38, 47.) Respondent initiated the pre-employment check and background investigation for the purposes of reinstating Mr. Armijo's security clearance. (CX-38. See also CX-39, 47.) On September 8, 1992, Mr. Gillison recommended that an additional investigation relative to Mr. Armijo's maintenance of a DOE security clearance be conducted. (CX-38. See also CX-39, 47.) On November 25, 1992, Mr. Gillison recommended that Mr. Armijo's security clearance be reinstated because there was insufficient information to substantiate

the earlier allegations of wrongdoing. (CX-41. See also CX-31, 38, 39, 47.) Mr. Armijo alleged that the delay in reinstating his security clearance was retaliatory in nature.<sup>170</sup> (CX-47.)

On November 22, 1993, the DOE's Office of Contractor Employee Protection issued a Proposed Disposition relative to Mr. Armijo's whistleblower complaint. (CX-47.) The DOE concluded that Mr. Armijo's fourteen-day suspension, termination, and delay in reinstating his security clearance were based in part on his previous disclosures to management of potential health and safety violations. (CX-47.) An Initial Agency Decision was issued on February 28, 1994, based upon the findings in the Proposed Disposition. (CX-52. See also CX-47.)

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## 2. Gary L. Cupp

On March 28, 1995, Gary L. Cupp participated in the Employee Assistance Program ("EAP"). (CX-66.) On or about September 12, 1995, Mr. Cupp filed a whistleblower complaint with the DOE. (CX-70.) Mr. Cupp alleged that

he was retaliated against and removed from the Training Division with a reduction in pay grade as a result of [Respondent] gaining knowledge of statements he provided to the United States Department of Labor's Office of Federal Contract Compliance Programs, as well as his participation in an interview conducted by the DOE Inspector General's office. (CX-70.)

On September 16, 1997, Mr. Cupp, manager of alarms and communications, advised Ms. Bange, director of human resources, about inquiries he had received concerning Respondent's compliance with equal employment opportunity regulations. (CX-101.) On October 20, 1997, Mr. Cupp sent an e-mail message to four persons, including Mike Cosgrove. (CX-104.) Therein, Mr. Cupp inquired as to whether Respondent's contract prohibited him from communicating directly with DOE personnel, and explained that he was advised that all such communications must go through Kaiser-Hill. (CX-104.)

On October 22, 1997, Mr. Cosgrove reprimanded Mr. Cupp on four grounds, including his "reaction to Kaiser-Hill's request [that he] follow proper protocol when dealing with technical taskings from DOE." (CX-105.) Mr. Cupp was "suspended with pay until further notice." (CX-105.) On the same day, Mr. Cosgrove and Mr. Cupp met for the purpose of discussing correspondence that Mr. Cupp had sent to the DOE. (CX-108.) During the course of this meeting, Mr. Cupp opined that Mr. Cosgrove was violating the terms of his settlement agreement. (CX-108.) Mr. Cosgrove replied:

I will be glad to work with you on your cc:mail concerns and your memos. We can go over them line by line, but you've got to stop this letter writing campaign.

This is disrupting the work place and is counter productive. You've got to turn this behavior around and stop this intimidation through your memos or we'll never work together as a team. . . . I am not saying you can't utilize the whistleblower program. But you owe it to us to try and work these issues here before you go to DOE.

(CX-108 at MG2717.) Later that day, Mr. Cupp transmitted correspondence to Mr. Cosgrove stating that he wanted to be part of his management team. (CX-106.) Mr. Cosgrove questioned Mr. Cupp's sincerity in a letter dated October 22, 1997. (CX-107. See also CX-108 at MG2715.) Mr. Cupp was also encouraged to participate in the Employee Assistance Program. (CX-105, 107.)

On November 7, 1997, Mr. Cosgrove met with Mr. Isom, Ms. Bange, and Mr. Cupp to discuss a variety of issues relative to Mr. Cupp's conduct. (CX-113.) Mr. Cupp signed a Corrective Action Plan requiring, among other things, that he maintain professional behavior and utilize a "cooling off" period when he becomes upset about an issue. (CX-114.)

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### 3. Jo-Marie Lisa

On June 17, 1992, Joseph F. Weiss sent Ms. Lisa a letter of reprimand for unprofessional conduct in her dealings with Frances Chaves and Denise Hayden. (CX-34.) The letter also referenced a counseling session on May 29, 1992, in which her corporate loyalty and lack of professionalism were at issue. (CX-34.) Ms. Lisa was placed on a sixty-day monitored probationary period. (CX-34.)

On June 18, 1992, Ms. Lisa sent a response to Mr. Weiss. (CX-35.) Therein, Ms. Lisa states that her corporate loyalty was questioned relative to Ben Bonner's and Robert Atkinson's termination of employment. (CX-35.) Ms. Lisa questioned whether the May 29, 1992, meeting constituted a "counseling session" and asked Mr. Weiss to provide further information to support his allegations. (CX-35.)

On July 22, 1992, Mr. Gillison terminated Ms. Lisa's employment.<sup>171</sup> (CX-37.) The termination letter stated, "Due to your performance and recent conduct, I am terminating your employment at the close of business Wednesday, 7/22/92." (CX-37.)

On January 15, 1993, Ms. Mulhall transmitted a memorandum to Jim Long concerning the termination benefits paid to Mr. Bonner and Mr. Atkinson, and potential defense strategies relative to Ms. Lisa's whistleblower complaint. (CX-42, 32.)

On April 11, 1994, the DOE's Office of Contractor Employee Protection transmitted a summary of her alleged disclosures and reprisals to Mr. Gillison. (CX-53.) Ms. Lisa alleged, among other things, that she raised issues concerning the overspending of the

Salary Increase Fund, and the termination of the general manager and deputy general manager. (CX-53.)

#### 4. Marilyn Mulhall

On January 15, 1993, Ms. Mulhall transmitted a memorandum to Jim Long concerning the termination benefits paid to Mr. Bonner and Mr. Atkinson, and potential defense strategies relative to Ms. Lisa's whistleblower complaint. (CX-42, 32.) On January 27, 1993, Ms. Mulhall wrote a memorandum to Mr. Gillison expressing her frustrations in dealing with "TWC corporate" staff. (CX-44.) On February 23, 1993, Ms. Mulhall transmitted a memorandum to Mr. Gillison regarding the administrative problems that she had identified and was attempting to resolve. (CX-45.) On July 1, 1993, Ms. Mulhall transmitted a memorandum to Mr. Gillison concerning problems that she was having with Richard Levernier which were interfering with her ability to perform her job. (CX-46.)

On December 23, 1993, Ms. Mulhall received a \$3,000 job performance bonus from Mr. Gillison. (CX-48.) On January 6, 1994, Ms. Mulhall orally complained to Mr. Gillison about a program that she considered to be wasteful. (CX-67 at MG3105.) In a meeting on an upcoming government audit, Ms. Mulhall stated her intention to inform the auditors as to the names of responsible individuals if problems were found. (CX-67 at MG3105.)

On January 7, 1994, Mr. Gillison advised Ms. Mulhall that her program responsibilities were being reduced, and that she was not authorized to interface with the DOE audit team. (CX-49. See also CX-67 at MG3105-06.) On January 10, 1994, Ms. Mulhall contacted a DOE representative and declared herself to be a whistleblower. (CX-67 at MG3105.)

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On January 19, 1994, Ms. Mulhall was reprimanded for disrupting a confidential meeting in Ms. Bange's office and ordered to participate in the Employee Assistance Program ("EAP").<sup>172</sup> (CX- 50, 51. See also CX-58, 67.) Ms. Mulhall's "Q" clearance was also removed at this time. (CX-58.) On January 19, 1994, Ms. Mulhall submitted her first formal whistleblower complaint in a letter to DOE Manager Mark N. Silverman. (CX-67.)

On or about March 3, 1994, Ms. Mulhall was removed from the position of Director, Administration. (CX-58, 67.) According to Mr. Gillison, this action was taken in response to employee complaints, including

alleged use of obscene and offensive language and hand gestures, rude and abusive comments, discriminatory remarks with respect to gender on numerous occasions and with respect to race on at least one occasion, and intimidating

behavior which included encouraging employees to work for her on personal projects at her private residence.

(CX-58 at MG3211.)

On May 9, 1994, DOE Manager Mark N. Silverman advised Mr. Gillison that Ms. Mulhall had filed a whistleblower complaint. (CX-54.) Mr. Silverman's memorandum provides, in part:

Ms. Mulhall alleges that she is suffering retaliatory action for raising various concerns about WSI's failures to adhere to the terms of the contract with DOE, as well as instances of possible fraud, waste, and abuse. The alleged retaliatory actions include several disciplinary actions, removal of "Q" clearance, removal from and deletion of her position of Director, Administration, placement into an untitled, non-specific position, as well as removal from her office.

....

As part of the informal resolution process outlined in section 708.7, we ask that you review this matter and provide a written response concerning WSI's position on Ms. Mulhall's allegations, and on affording the relief she is requesting.

(CX-54.)

On May 10, 1994, Ms. Mulhall objected to the internal investigation, stated she would only respond to written questions, and asserted that said investigation was harassing and retaliatory in nature. (CX-55.) Ms. Mulhall also filed a formal complaint against Respondent on May 10, 1994, wherein she alleged gender discrimination, disability discrimination, and whistleblower retaliation claims.<sup>173</sup> (CX-56.) In her pleadings, Ms. Mulhall states that she is suffering from fibromyalgia, she is experiencing side effects from medication, and that said side effects are affecting her ability to perform her job in a satisfactory manner. (CX-56 at MG2831. See also CX-67.)

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On May 25, 1994, Mr. Gillison provided the DOE with a written response refuting Ms. Mulhall's whistleblower claims. (CX-58.) On June 6, 1994, Ms. Mulhall's employment was terminated on the grounds that she had violated several of Respondent's work rules. (CX-60, 61.) Respondent's Discipline Review Board determined that Ms. Mulhall had exhibited inappropriate behavior towards other employees, had failed to comply with the travel policies, and had refused to cooperate with the internal investigation. (CX-60, 61.)

On September 2, 1995, Ms. Mulhall signed an affidavit in support of her claims against Respondent. (CX-67.) Therein, Ms. Mulhall states that there are sound medical reasons for her behavior on January 6, 1994. (CX-67 at MG3101, MG3104-05. See also CX-69.) She also admits to having used profanity in the work place. (CX-67 at MG3103.) Nevertheless, Ms. Mulhall contends that Respondent did not provide her with the



requisite counseling sessions and performance appraisals. (CX-67.) She also asserts that some of her male colleagues were not disciplined for similar conduct. (CX-67. See also CX-69.) Moreover, Ms. Mulhall received a \$3,000 bonus which appears to be inconsistent with any performance problems during 1993. (CX-67 at MG3104.) She also recounted the series of events leading up to her termination, which have been summarized above. (CX-67.)

##### 5. Jeffrey B. Peters

On January 23, 1993, Ms. Mulhall transmitted a memorandum to Bill Gillison concerning the unresponsiveness of Mr. Peters and his staff to her requests. (CX-43.)

###### a. Letters to Congressman Skaggs

On December 8, 1995, Jeffrey B. Peters sent a four page letter to Congressman David E. Skaggs concerning site safety and security issues. <sup>174</sup> (CX-72, 77.) Therein, Mr. Peters recounts some of the events surrounding the movement and storage of special nuclear materials during October and November 1995. <sup>175</sup> (CX-72, 77.) A copy of this letter was sent to Edward McCallum, director of the DOE's Office of Safeguards and Security. (CX-72, 77.) On or about December 15, 1995, it was determined that the letter contained no classified information. (CX-73.)

On December 15, 1995, A. Bryan Siebert transmitted an internal memorandum to Edward J. McCallum stating that the letter from Mr. Peters to Congressman Skaggs dated December 8, 1995, "contains no classified information." (CX-73.)

On December 22, 1995, DOE Manager Mark N. Silverman transmitted a letter to Congressman Skaggs in response to the issues raised in Mr. Peters' letter dated December 8, 1995. (CX-74.) Mr. Silverman also requested the Office of Security Affairs perform an independent review of the site security issues raised in Mr. Peters' letter. (CX-74 at W0018.)

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###### b. Alleged Retaliation

On December 5, 1995, Mr. Peters was placed on administrative leave. (CX- 75.) On January 17, 1996, Mr. Peters agreed to abide by the standards of conduct set forth in the Corrective Action Plan identified as Complainant's Exhibit 75. (CX-75. See also CX-86.) Mr. Peters was also encouraged to continue voicing his security concerns. (CX-75 at MG3274.)

DOE employee Marcy Nicks interviewed Mr. Gillison on five occasions during the course of her investigation into Mr. Peters' whistleblower claims. <sup>176</sup> (CX-79.) Complainant's Exhibit 79 is a twenty-page synopsis of said interviews. (CX-79.)

On March 29, 1996, DOE Manager Mark Silverman sent an e-mail message to Cal Waller, Bob Card, Dana Lindsay, and Keith Klein titled "Update on Jeff Peters." (CX-82.) Mr. Waller sent the following reply:

Mark: We will not terminate Jeff Peters today or early next week. Jim Long is coming to the Site next week and we will wait until WSI lawyers and Long have had a chance to make the right decision with the least impact on their bottom line. As a reminder, WSI is liable for this case or any other case like this. I will keep you updated.

(CX-82. See also Tr. at 1080-81.) Mr. Waller apparently sent a copy of these messages to Mr. Gillison on April 1, 1996, and included the following handwritten note:

Bill, You can see I am getting a lot of cc mail on Mr. Peters. Cal.

(CX-82. See also Tr. at 1077-82.)

*c. OPM/DOE Investigation*

On February 4, 1996, Mr. Peters' attorney sent a draft complaint to the DOE headquarters in Washington, D.C. (CX-86 at MG0512.) Mr. Peters claimed that he was reassigned from his director of protective force operations position to the director of training position on January 17, 1996, in retaliation for making safety and security complaints to Respondent, Kaiser- Hill, and the DOE. (CX-86 at MG0512.) Respondent asserted that Mr. Peters was disciplined for leaving a meeting, where security concerns were being discussed, against his supervisor's instructions. (CX-86 at MG0512, MG0525.) Respondent also contended that the reassignment was necessary to alleviate Mr. Peters' stress and was not retaliatory in nature. (CX-86 at MG0512.) The DOE's Office of Internal Assessment investigated this matter. (CX-86.)

On June 6, 1995, the DOE's Director of Internal Assessment transmitted the Final Inquiry Report relative to Mr. Peters' informal whistleblower complaint to the DOE's Manager at RFETS. (CX-86.) The Report sets forth the investigators' findings and conclusions. (CX-86.) The investigators determined that there was an appearance of retaliation against Mr. Peters.<sup>177</sup> (CX-86.)

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*6. Michael Angelo*

On February 17, 1999, Michael Angelo signed an affidavit which provides in part:

4. I am familiar with the letter that Jeff Peters wrote to Congressman Skaggs. Mr. Peters sought and received my input on this letter to Congressman Skaggs concerning RFETS security concerns and issues. I was also present when Mr.

Peters sought and received Mark Graf's input on this letter to Congressman Skaggs concerning security concerns and issues. Mr. Peters also sought and received input on this letter to Congressman Skaggs from other Wackenhut employees.

....

6. I was never retaliated against for my participation in Mr. Peter's [sic] letter to Congressman Skaggs.

7. Over the years there have been times that both Mark Graf and I have had to work long hours or lots of hours. These extended hours have mainly been due to mitigating circumstances. It has not been in retaliation for something either of us has done.

(CX-145.)

### **W. Exhibits: Audio Tapes**

Complainant's Exhibit 3 contains a listing of approximately 120 tape recorded conversations that Complainant produced during discovery in this matter. (CX-3.) Several of these recordings, or portions thereof, were introduced into evidence at the formal hearing. (See CX-4, 5, 89, 95; RX-H, I, J.)

#### **1. Peters' Conversations with McCallum**

On February 7, 1996, Mr. Peters tape recorded a telephone conversation with Edward McCallum of the DOE. (CX-89.) Mr. Peters called Mr. McCallum to ask how he could keep a copy of the classified letter to Mr. Gillison at an off-site location. (CX-89 at 2-3, 7, 9.) They also discussed Mr. Peters' security concerns, his whistleblower activities, and investigations into his allegations. (CX-89.) In addition, Mr. McCallum suggested that Mr. Peters contact the Defense Nuclear Facility Safety Board ("DNFSB"). (CX-89.)

Early in the conversation, Mr. Peters states that he is going to follow up with Congressman Skaggs' staff. (CX-89 at 6.) Mr. McCallum replies, "I think they're going to take a dodge and say, well, the material's bad so any temporary things are you know, no big deal, and take a dodge like that." (CX-89 at 7.) Complainant takes the position that Mr. McCallum is referring to the DOE investigators. (CX-89 at 31.) However, it appears that Mr. McCallum is referring to Congressman Skaggs or his staff. (CX-89 at 6-7.) The DOE investigation was not discussed until later in the conversation. (See CX-89 at 10-15.)

On May 7, 1997, Mr. Peters tape recorded another telephone conversation with Edward McCallum. (CX-95.) At that time, they discussed the Annual Report to the President, Mr. McCallum's security concerns, and recent inquiries being made by the DNFSB. (CX-95.)

## 2. Complainant's Conversation with Abelson

On May 19, 1997, Complainant recorded a telephone conversation with David Abelson of Congressman Skaggs' office.<sup>178</sup> (RX-I.) They discussed Complainant's expressed frustration over the perceived delay in addressing the security concerns detailed in the letter signed by Mr. Peters. (RX-I. See also Tr. at 761-65.) Complainant also expressed his fear of being fired for openly engaging in whistleblower activities. (RX-I at 1-2, 7. But see RX-I at 16-17. See also Tr. at 751-52.)

Moreover, they discussed the merits of a RFETS policy requiring employees to notify management of any contact with the DNFSB.<sup>179</sup> (RX-I at 17-18. See also Tr. 765-66.) Mr. Abelson requested a copy of the policy and opined that it may be an unlawful infringement on Complainant's freedom of speech. (RX-I at 17-19.)

### **III. DISCUSSION**

#### **A. Credibility Evaluations**

I have thoughtfully considered and evaluated the rationality and internal consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence and have attempted to analyze and assess its cumulative impact on the record. See Frady v. Tennessee Valley Auth., 92-ERA-19 at 4 (Sec'y Oct. 23, 1995)(citing Dobrowolsky v. Califano, 606 F.2d 403, 409-10 (3d Cir. 1979)); Indiana Metal Prod. v. Nat'l Labor Relations Bd., 442 F.2d 46, 52 (7th Cir. 1971).

Credibility is that quality in a witness which renders his evidence worthy of belief. See id. For evidence to be worthy of credit,

[it] must not only proceed from a credible source, but must, in addition, be 'credible' in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe it.

Indiana Metal Prod., 442 F.2d at 51. An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. See Altamose Constr. Co. v. Nat'l Labor Relations Bd., 514 F.2d 8, 15 n.5 (3d Cir. 1975)(citing National Labor Relations Bd. v. Universal Camera Corp., 179 F.2d 749, 754 (2d Cir. 1950), vacated and remanded on other grounds, 340 U.S. 474 (1951)).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior and outward bearing of the witnesses from which impressions were garnered as to their demeanor. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

*1. Complainant*

Generally, Complainant was a very slow, methodical, and disingenuous witness. When compared with Mr. Angelo, Complainant had almost a colorless personality. His overall demeanor did not inspire confidence in his credibility. Furthermore, his testimony contained inconsistencies which called his credibility into question.

For instance, the record is replete with explanations of why Complainant did not abide by the site classification review procedures before making public disclosures of potentially classified information. Some of these explanations raise questions about Complainant's credibility because they are illogical or inconsistent with one another. For example, Complainant testified that he had been instructed during ADC training that he was not authorized to approve information for public release. (Tr. at 668-69. See also CX-118 at MG0375; CX-119.) Nevertheless, Complainant further testified that he was authorized to disclose information to the media without going through the Classification Office because he was an ADC.<sup>180</sup> (See, e.g., Tr. at 688, para. 7-11.)

Moreover, Complainant opined that he was "best suited" to make classification determinations because of his training as an ADC and SME. (CX-110 at W0216. See also CX-118 at MG0373; CX-119 at 4.) Nevertheless, Complainant conceded that some of the information had been outside his area of expertise, and, as such, had been reviewed by other ADCs. (CX-110 at W0138; Tr. at 747.) He also acknowledged that his classification knowledge was not absolute. (Tr. at 656.)

Complainant also took the position that the Long & Jaudon letter excused him from complying with the classification review policy. (See Tr. at 743-47; CX-110 at W0128; CX-92.) Complainant conceded that the policy set forth in the Long & Jaudon letter did not preclude him from personally complying with the classification review procedure. (Tr. at 743-44.) Indeed, he testified that the Contractor Classification Office was willing to review his material. (Tr. at 743-44.) Nonetheless, Complainant allegedly chose not to request such a review on the ground that it would be incomplete after he combined his information with that of Mr. Peters. (Tr. at 743-44.) Assuming this to be true, Complainant evidentially concluded that no review was better than an incomplete review. (See Tr. at 745-47.) Such reasoning, when combined with his knowledge of the classification review policy, is, at best, indicative of poor judgment.

Furthermore, I find that the "personal opinion" exception set forth in the "White Paper" was not a motivating factor in Complainant's decision not to comply with the classification review procedure. There is no record evidence indicating that Complainant was aware of this or any similar policy pertaining to his freedom of speech during the times that he engaged in protected activities. (See, e.g., Tr. at 688-89.)

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Based on the foregoing, I find and conclude that Complainant's testimony is generally unreliable, and absent corroborating evidence, is insufficient to establish any controverted fact. I further find that Complainant's noncompliance with the classification review policy was primarily motivated by his personal disagreement with said policy. (See Tr. at 677.) In addition, Complainant's noncompliance appears to have been partially motivated by the fact that the classification review policy had not been enforced against him during Mr. Gillison's tenure as general manager. (See, e.g., Tr. at 619, 646. But see Tr. at 648-49.)

Finally, the record reveals that portions of Complainant's testimony are misleading. For example, Complainant testified that he did not receive overtime compensation in December 1995. (Tr. at 580-81.) However, the uncontroverted evidence shows that in March 1995, Complainant's annual salary was adjusted from \$44,279 to \$68,692, resulting in a 55% annual increase. (CX-15 at W0130.) This increase was due to a change in Respondent's compensation system for "top level operations exempt personnel from a base plus overtime to an annual salary." (CX-15 at W0132. See also Tr. at 801-02, 925-27.) As such, Complainant was compensated for anticipated overtime hours in December 1995, because he had recently received a 55% increase in his annual salary. (See Tr. at 801-01, 1178; CX-15.) Hence, I find Complainant's misleading testimony to further compromise his credibility.

## 2. William Armijo

William Armijo appeared to have a particularly hostile demeanor with respect to Respondent. Indeed, he seemed to have "his own score" to settle with Respondent. Mr. Armijo did not have a demeanor that inspired confidence in his credibility.

## 3. Gail L. Bange

Gail L. Bange appeared to be a loyal employee of Respondent and part of the "team." Nevertheless, she had a sincere demeanor and provided detailed testimony at the hearing. Though I find most of her testimony to be credible, I question her accuracy as a shorthand reporter. (Tr. at 966, 970.) Ms. Bange conceded that her shorthand speed had decreased since her secretarial days. (Tr. at 966.) When asked to translate a simple shorthand sentence, however, Ms. Bange was only able to identify two of the four words in the sentence. (Tr. at 970.) Hence, Ms. Bange has either misrepresented her shorthand ability or has developed her own shorthand style over the years. Accordingly, this testimony calls into question the credibility of Exhibits 112, 120, 126, and 127. (See Tr. at 951-54; CX-112, 120, 126, 127.)

## 4. Steven L. Cunningham

Steven L. Cunningham's sincerity and overall bearing on the witness stand was consistent with the demeanor of a person who was telling the truth regardless of whether

his answers would be favorable to Respondent. His testimony did not waiver in the face of probing questions from Complainant's counsel. Hence, I find Mr. Cunningham to be a credible witness.

5. William R. Gillison

William R. Gillison was an impressive witness in terms of confidence and forthrightness. His testimony was straight-forward and presented in a detailed, consistent manner. Mr. Gillison appeared to be a highly credible witness.

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6. Denise A. Graf

Denise A. Graf was a timid but sincere witness. Her demeanor was consistent with a person who was telling the truth to the best of her ability.

7. Marcy A. Nicks

Marcy A. Nicks appeared to be a disgruntled employee, which perhaps was due to her receiving an unfavorable job performance rating and filing of a gender discrimination complaint. In short, her demeanor did not inspire confidence in her credibility.

8. Jeffrey B. Peters

Jeffrey B. Peters is an intense and proud man who appears to believe that any means are acceptable if, in his view, the ends are desirable. For example, Mr. Peters continued making secret audiotapes of Mr. Levernier's conversations despite Mr. Gillison's express instruction to stop making these tapes. (Tr. at 1000-01.) Similarly, despite repeated orders from Mr. Gillison that he remain in a management meeting concerning the movement of special nuclear materials, Mr. Peters declined to do so. (Tr. at 353-55, 519-20.) His "ends justifies the means" philosophy tends to compromise his credibility.

Although I found Mr. Peters to be knowledgeable about the circumstances surrounding this complaint, he appeared to be emotionally involved in this case. Mr. Peters' overall demeanor and testimony caused me to ponder whether he had manipulated Complainant. In short, I found him to be a hotheaded person who was lacking good judgment.

9. David E. Ridenour

David E. Ridenour was a poor witness and seemed to lack self confidence. Nevertheless, there did not appear to be any inconsistencies in his testimony.

10. James A. Vissar



Similarly, I found James A. Vissar to be an average witness in terms of his overall bearing on the witness stand. He appeared to be forthright when answering questions from opposing counsel.

*11. Michael T. Angelo*

Michael T. Angelo's testimony was presented in a reasonably detailed and sincere manner. I also found him to be much more personable than Complainant. Hence, I found Mr. Angelo's testimony that his managerial and interpersonal skills were superior than Complainant's to be credible. (See Tr. at 1170-71, 1201-02.)

Although there was conflicting testimony as to whether he had contributed to the letter sent to Congressman Skaggs, Mr. Angelo appeared to have a sincere belief that he had contributed to said letter. (See Tr. at 426-27, 576, 1189-92.) Moreover, Complainant testified that some of the information contained in this letter was gathered from employees assigned to the protective force. (Tr. at 576.) Nevertheless, I do not find this information to be relevant comparator evidence because there is no evidence indicating that Respondent had knowledge of Mr. Angelo's involvement. (See Tr. at 1194.)

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*12. Michael M. Cosgrove*

Michael M. Cosgrove appeared to be an extremely intelligent and capable manager. He was a forthright witness whose testimony did not waiver in the face of probing questions from Complainant's counsel. He appeared to answer questions to the best of his ability regardless of whether the answers given would or would not be favorable to his side of the litigation. Hence, Mr. Cosgrove appeared to be a credible witness.

*13. Ronald Leach*

Ronald Leach appeared to be a credible witness. At times, however, Mr. Leach was somewhat reluctant to commit himself to particular positions and appeared to be part of Respondent's team.

*14. Bryan Siebert*

Bryan Siebert's testimony was presented in a straight-forward and detailed manner. Despite repeated attempts by Complainant's counsel to discredit him, I found Mr. Siebert's testimony to be reasonably consistent. He appeared to be testifying truthfully about the DOE's classification policies and procedures.

**B. Standard for Proving Retaliatory Discrimination**

This case proceeded to a full hearing on the merits. Since Respondent presented evidence to rebut Complainant's prima facie case of an ERA violation,<sup>181</sup> it is not necessary to engage in an analysis of whether the Complainant established a prima facie case, and whether Respondent rebutted that showing. See Somerson v. Yellow Freight Sys., Inc., 1998-STA-9 (ARB Feb. 18, 1999); Adornetto v. Perry Nuclear Power Plant, 1997-ERA-16 at 3 (ARB Mar. 31, 1999); Eltzroth v. Amersham Medi-Physics, Inc., 1997-ERA-31 at 4 (ARB Apr. 15, 1999); Carroll v. Bechtel Power Corp. 91-ERA-0046 at 9-11, n.9 (Sec'y Feb. 15, 1995), aff'd sub nom. Carroll v. United States Dep't of Labor, 78 F.3d 352 (8th Cir. 1996). Instead, the relevant inquiry is whether, when viewing the evidence as a whole, the Complainant has proved by a preponderance of the evidence that retaliation for his protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3)(C). See also Trimmer v. United States Dep't of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999).

In order to prevail in a case based upon circumstantial evidence of retaliatory intent, the Complainant must establish by a preponderance of the evidence that he was engaged in activity protected under the Act, that he was subjected to adverse employment action, that Respondent was aware of the protected activity when it took the adverse employment action, and that the protected activity was the reason for the adverse action. See Trimmer, 174 F.3d at 1101-02; Seater v. Southern California Edison, 95-ERA-13 at 14 (ARB Sept. 27, 1996). Complainant may carry his burden of proof on any element of a discrimination claim by direct or circumstantial evidence. Bartlik v. Tennessee Valley Auth., 88-ERA-15 at 2 (Sec'y Apr. 7, 1993), aff'd sub nom. Bartlik v. United States Dep't of Labor, 73 F.3d 100 (6th Cir. 1996). It is not sufficient for Complainant to establish that the Respondent's proffered reasons for the adverse action are unbelievable; he must establish intentional discrimination in order to prevail. See Leveille v. New York Air Nat'l Guard, 94-TSC-3 at 4 (Sec'y Dec. 1, 1995).

If a complainant establishes by a preponderance of the evidence that the adverse action was motivated, at least in part, by retaliatory intent, the case will turn on the application of the "dual motive" analysis. Seater, 95-ERA-13 at 14; Yule v. Burns Int'l Sec. Svc., 93-ERA-12 at 4 (Sec'y May 24, 1995). See also Trimmer, 174 F.3d at 1101-02; Somerson, 1998-STA-9 at 17. Under the dual motive analysis, the burden shifts to the respondent to prove by clear and convincing evidence that, even though an improper motive played a role in its decision, it would have taken the same personnel action in the absence of the complainant's protected activities. See Yule, 93-ERA-12 at 4; Adjiri v. Emory Univ., 97-ERA-36 at 8 n.7 (ARB July 14, 1998); 42 U.S.C. § 5851(b)(3)(D). "While there is no precise definition for 'clear and convincing evidence,' the courts recognize that it is a higher burden than 'preponderance of the evidence' but less than 'beyond a reasonable doubt.'" Yule, 93-ERA-12 at 4.

Generally, the dual motive analysis only applies in cases "where the complainant produces evidence that directly reflects the use of an illegitimate criterion in the challenged decision." Carroll, 78 F.3d at 357. See also Blake v. Hatfield Elec. Co., 87-ERA-4 at 4 (Dep. Sec'y Jan. 22, 1992)(prior to 1992 amendments). In the context of discrimination cases, the Tenth Circuit has defined direct evidence as "evidence, which if

believed, proves existence of a fact in issue without inference or presumption." Shorter v. ICG Holdings, Inc., 1999 WL 622477, 2 (10th Cir. 1999).

### **C. Preliminary Findings of Fact and Conclusions of Law**

Although no formal stipulations were read into the record at the hearing and the parties did not file stipulations signed by both counsel, it is apparent from the parties' proposed decisions and orders that there is no disagreement as to the following issues:

1. Complainant is an employee governed by the ERA and Respondent is an employer governed by the ERA.
2. Respondent had knowledge of Complainant's protected activities when it allegedly took adverse employment action against him.
3. Complainant was subjected to the following adverse employment actions:
  - a. In December 1995, Complainant received additional overtime assignments;
  - b. In April 1996, Complainant was reassigned from a program management position to a supervisor position for the "A" day shift;
  - c. Complainant's participation in meetings and interface with the planning and maintenance departments decreased;
  - d. On January 28, 1998, Complainant was asked to voluntarily report to the EAP for evaluation;
  - e. On January 31, 1998, Complainant was placed on paid administrative leave;
  - f. In February or March 1998, Complainant was removed from his PSAP position; and
  - g. In March 1999, Mr. Angelo, rather than Complainant, was reassigned from a twelve-hour shift to a five-day work week.
4. "Temporal proximity" exists between the protected activities and the above-mentioned adverse employment actions.

(See RDO at 17-18, 20; CDO at 49-50, 53-59.)

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Because the record clearly reflects that the parties do not dispute the foregoing, and because their agreements are amply supported by the evidence, the same are hereby accepted as preliminary findings of fact and conclusions of law.

### **D. Protected Activity**

Complainant correctly asserts that he engaged in several protected activities. (CDO at 50-53.) It is protected conduct for an employee to express nuclear safety and security concerns to Congress. See Kansas Gas and Elec. Co. v. Brock, 780 F.2d 1505, 1510-13 (10th Cir. 1985); Ruud v. Westinghouse Hanford Co., 88-ERA-33 at 9 (ARB Nov. 10, 1997). Hence, Complainant engaged in a protected activity when he assisted Mr. Peters' in composing a letter to Congressman Skaggs dated December 8, 1995, concerning site

safety and security issues. (Tr. at 358, 360-61, 423-25, 574-77. See also CX-72, 77.) Said letter was at least partially responsible for prompting the formation of an independent review panel to examine the safeguard and security measures employed at RFETS. (See RX-F; Tr. at 737-39. See also RX-I (Complainant later urged Congressman Skaggs' staff to investigate the security issues raised in the letter dated December 8, 1995).)

Likewise, it is well settled that providing nuclear safety information to governmental agencies is protected under the Act. See 42 U.S.C. § 5851(a); Kansas Gas and Elec. Co., 780 F.2d at 1510-13. Consequently, sending a copy of said letter to Mr. McCallum, director of the DOE Office of Safety and Security, was protected activity. (CX-72, 77.) The record reveals that DOE officials conducted an investigation into the allegations raised in the letter to Congressman Skaggs. (CX-76; Tr. at 592, 684, 731.) Complainant also engaged in protected activity when he sent a letter to the DNFSB dated September 26, 1996, and met with DNFSB members in February 1997. (CX-96; Tr. at 593, 619, 740-41.) Later, a DNFSB representative informed Complainant that, due in part to his efforts, Congress had created an independent review board for security concerns at nuclear facilities. (Tr. at 629, 740.)

Similarly, disclosing information to government agency representatives that are investigating a fellow employee's whistleblower complaint is protected under the Act. See Floyd v. Arizona Pub. Serv. Co., 90-ERA-39 at 2, 4 (Sec'y Sept. 23, 1994). Hence, Complainant's participation in the investigation conducted by DOE Employee Concerns Manager Marcy Nicks and OPM investigator Linda Weghorst concerning Mr. Peters' whistleblower complaint is protected activity. (Tr. at 696-97, 713, 921-22; CX-86.) Additionally, Complainant's filing of this whistleblower complaint on March 26, 1998, is protected activity. See McCuistion v. Tennessee Valley Auth., 89-ERA-6 (Sec'y Nov. 13, 1991).

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Internal reporting of safety and security concerns to company supervisors is also protected activity under the Act. See 42 U.S.C. § 5851(a)(1)(A); Kansas Gas and Elec. Co., 780 F.2d at 1513 (citing Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1162-63 (9th Cir. 1984)). Thus, Complainant engaged in protected activity when he submitted an eight page classified document to Mr. Gillison, Respondent's general manager, detailing his perceived security concerns at RFETS. (Tr. at 594; CX-131.) In response, Mr. Gillison directed a team of four managers to investigate the issues raised in said memorandum. (CX-87, 131; RX-E; Tr. at 604-05. See also CX-84, 99.)

Finally, Complainant engaged in protected activity when he was interviewed by reporters from the Denver Post and CBS News about his site safety and security concerns. (Tr. at 606-08, 621-22, 624, 683.) On May 20, 1997, the Denver Post published an article wherein Complainant was quoted. (CX-97; Tr. at 606, 608.) Likewise, CBS News attributed certain information to Complainant in a press release and a two-part broadcast on RFETS security. (CX-109, 116; RX-C; Tr. at 625-26.) The Secretary of

Labor has ruled that speaking with the news media about nuclear safety concerns is protected activity under the Act. See Floyd, 90-ERA-39 at 4 (citing Pooler v. Snohomish County Airport, 87-TSC-1 at 3 (Sec'y Feb. 14, 1994)); cf. Crosby v. Hughes Aircraft Co., 85-TSC-2 at 23 n.15 (Sec'y Aug. 17, 1993)(contacting the media was not protected under an environmental acts' analogous whistleblower provisions because the subject matter raised with the media was not an environmental concern).

#### **E. Adverse Employment Action Subsequent to Protected Activity**

As detailed above in the "preliminary findings of fact and conclusions of law" section, Respondent concedes that Complainant was subjected to seven adverse employment actions. In addition, Complainant asserts that he was subjected to the following adverse actions:<sup>182</sup>

1. The denial of Complainant's request to take a block of "comp time" in exchange for overtime hours worked in December 1995;
2. The disciplinary action and threatened disciplinary action occurring after Complainant's communications with CBS News in September or October 1997, including:
  - a. The threat of disciplinary action, up to, and including, termination if Complainant failed to cooperate fully with Respondent's internal investigation on January 28, 1998;
  - b. The threat of a one-day disciplinary suspension without pay on March 24, 1998;
  - c. The attempts to solicit Complainant's compliance with the terms set forth in the Corrective Action Plan dated March 24, 1998, and the revised Corrective Action Plan dated April 7, 1998;
  - d. Respondent's refusal to accept the terms of Complainant's addendum to the Corrective Action Plan dated March 24, 1998; and
3. The posting of three cartoons on Respondent's bulletin boards.

(See CDO at 54-56; RDO 17-20.)

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To constitute an adverse action, Complainant must demonstrate by a preponderance of the evidence that the action had some adverse impact on his employment. See Trimmer, 174 F.3d at 1103 (citing Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997)). The Tenth Circuit liberally defines the phrase "adverse employment action" and "takes a case-by-case approach to determining whether a given employment action is 'adverse.'" Jeffries v. Kansas, 147 F.3d 1220, 1232 (10th Cir. 1998)(employment action is not required to be materially detrimental).

In Jeffries, for example, verbal interrogation and reprimand were sufficient to constitute adverse employment actions even though said actions did not actually have an adverse

impact on the terms and conditions of the employee's employment. Id. Other examples of adverse actions include "decisions that have demonstrable adverse impact on future employment opportunities or performances, demotions, [ ] unjustified evaluations or reports, transfer or reassignment of duties, [and] failure to promote." Fortner v. Kansas, 934 F. Supp. 1252, 1266-67 (internal citations omitted), aff'd sub nom. Fortner v. Rueger, 122 F.3d 40 (10th Cir. 1997). Nevertheless, it is not sufficient for a complainant to simply testify that he did not like the action or wished that the action had not occurred. Trimmer, 174 F.3d at 1103 (citing Greaser v. Missouri Dep't of Corrections, 145 F.3d 979, 984 (8th Cir. 1998)). See also Fortner, 934 F. Supp. at 1266-67 ("[N]ot everything that makes an employee unhappy is an actionable adverse action." Speculative harm will not constitute adverse employment action. Id.

*1. Denial of Request for "Comp Time"*

Complainant's assertion that Respondent disallowed his "comp time" request "despite [its] allowance of others to do so," is not supported by the record evidence. (CDO at 55.) Rather, the record reveals that

Respondent had implemented a policy change approximately six months earlier that discontinued "comp time" allowances for salaried sergeants, lieutenants, and captains. (Tr. at 925-26.)

In March 1995, Respondent received DOE approval to change its compensation system for "top level operations exempt personnel from a base plus overtime to an annual salary." (CX-15 at W0132. See also Tr. at 801-02, 925-27.) As a result, salaried protective force supervisors were no longer qualified for overtime compensation or "comp time" based on the number of hours that they worked. (Tr. at 926-27.) Rather, overtime compensation was factored into their annual salaries. (Tr. at 801-02, 1178.) The new compensation policy was implemented on March 20, 1995. (CX-15 at W0130.) At that time, Complainant's annual salary was adjusted from \$44,279 to \$68,692, resulting in a 55% annual increase. (CX-15 at W0130.)

In December 1995, Complainant decided that he wanted to take at least one week of consecutive "comp time" during January 1996. (Tr. at 800, 830, 1177-78.) However, he was later informed by Mr. Sayers of the Payroll Department that it was not possible to take the requested "comp time." (Tr. at 801, 830.) Consequently, Complainant took one week of vacation time instead. (Tr. at 582; RX-M.)

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Complainant has presented no credible evidence to show that management allowed similarly situated employees to take "comp time" after the compensation policy was changed. Moreover, Complainant's self-serving testimony that his supervisor could have approved his "comp time" request is insufficient to meet his burden. (Tr. at 830.) I find



that Complainant's testimony is not credible without corroborating evidence, and that the above- mentioned evidence establishes that "comp time" was no longer available.

Complainant appears to rely on Mr. Angelo's testimony that he has taken up to three consecutive days of "comp time" in the past. (Tr. at 1199.) However, the record is unclear as to whether Mr. Angelo was permitted to take "comp time" after the compensation system was changed. (Tr. at 1199.) Moreover, Mr. Angelo testified that "comp time" had generally been taken in one-or-two-day increments. (Tr. at 1177-78.) He explained that one-or-two-week periods of "comp time" were disallowed because they would have adversely impacted the shift operations. (Tr. at 1178.) Therefore, I find that Mr. Angelo's testimony supports Respondent's position that the denial of the "comp time" request was proper under company policy. I further find and conclude that Complainant was treated like other employees with equal status, and that the denial of Complainant's "comp time" request was not an adverse employment action. See Mosbaugh v. Georgia Power Co., 91-ERA-1 at 9 (Sec'y Nov. 20, 1995)(not an adverse action when complainant was treated like other similarly situated employees under company policy); Moody v. Tennessee Valley Auth., 91-ERA-40 at 2 (Sec'y Apr. 26, 1995).

## 2. Actions Occurring After Communication with CBS News

Nevertheless, Complainant correctly asserts that the disciplinary action and threatened disciplinary action occurring after his communications with CBS News in September or October 1997, constitutes adverse employment action. The uncontroverted evidence establishes that Mr. Cosgrove threatened Complainant with disciplinary action, up to, and including, termination if he failed to cooperate fully with Respondent's internal investigation on January 28, 1998. (Tr. at 1247-49; CX-120. See also CX-121.) At that time, Complainant complied with Mr. Cosgrove's request to cooperate with the internal investigation, so the disciplinary action was never realized. (See CX-121; CX-120 at W0233.)

Approximately two months later, on March 24, 1998, Mr. Cosgrove composed a disciplinary letter issuing a one-day suspension without pay. (Tr. at 897-904; 1252, 1265-67; CX- 13 at MG0103; CX-124.) The suspension was not implemented, however, the suspension may be implemented if Respondent prevails in this matter. (Tr. at 897, 1386-87.)

Similarly, the Corrective Action Plan dated March 24, 1998, and the revised Corrective Action Plan dated April 7, 1998, contain language stating that Complainant's failure to abide by the conditions contained therein will result in "further disciplinary action up to and including termination." (CX-13 at MG0104-0105; CX-125; CX-129 at MG0332-0333; CX- 130 at MG0332-0333.) The Corrective Action Plan dated March 24, 1998, sought to place Complainant on at least sixty days of probationary service before resuming normal job duties.<sup>183</sup> (CX-13 at MG0104-0105; CX-125, para. 5.) Again, these threatened disciplinary actions were unrealized because Complainant refused to acquiesce to the terms of the Plans.



Indeed, Complainant refused to comply with the terms of the Corrective Action Plan dated March 24, 1998, absent Respondent's acceptance of the following addendum:

I reserve my right to make disclosures of violations or perceived violations of the Energy Reorganization Act and/or the Atomic Energy Act. I do not admit that I have acted improperly in the past and protest this discipline.

(CX-125 at MG0390. See also CX-126 at W0196.) This addendum was unacceptable to Mr. Cosgrove, and, as such, Complainant was ordered to remain on paid administrative leave.<sup>184</sup> (CX-127, 128.) Similarly, Complainant remained on paid administrative leave because he refused to sign a revised Corrective Action Plan dated April 7, 1998. (CX-129 at MG0332-0333; CX-130 at MG0332-0333.)

Clearly, Mr. Cosgrove did not follow through with the threats of suspension without pay or termination. Nonetheless, the Supreme Court has ruled that unfulfilled threats, if sufficiently severe, can constitute a claim for hostile work environment. Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2259-60 (1998). See also Smith v. Esicorp, Inc., 93-ERA-16 at 11-12 (Sec'y Mar. 13, 1996). Hostile work environment claims do not require a showing of a tangible job detriment. See id. Rather, Complainant must establish that the action was "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile working environment." Smith, 93-ERA-16 at 11-12 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

Here, Respondent's general manager threatened to take disciplinary action against Complainant on at least three separate occasions during a three month period. When a manager repeatedly threatens disciplinary action such as suspension without pay or termination, an employee may reasonably fear the actualization of said threats. Hence, I find and conclude that the aforementioned threats, even though they were not carried out, are sufficiently severe and pervasive as to constitute adverse employment actions. See Burlington Indus., Inc., 118 S. Ct. at 2259-60; Jeffries, 147 F.3d at 1232-33 (unrealized threats may rise to the level of actionable retaliation).

Furthermore, I find and conclude that the attempts to solicit Complainant's compliance with the terms set forth in the aforementioned Corrective Action Plans, and the refusal to accept the terms of Complainant's addendum to the Corrective Action Plan dated March 24, 1998, are sufficient to constitute adverse employment actions because they directly impaired Complainant's ability to resume his normal job duties. See Carter v. Electrical Dist. No. 2 of Pinal County, 92-TSC-11 at 9 (Sec'y July 26, 1995)(citing DeFord v. Secretary of Labor, 700 F.2d 281, 287 (6th Cir. 1983))(economic loss is not required for action to be adverse).

### 3. Posting of Cartoons

Finally, the record reveals that three cartoons were posted on Respondent's bulletin boards when Complainant returned from paid administrative leave in late September or early October 1998. (See Tr. at 610-12, 716-18; CX-10.) One cartoon was posted on the bulletin board inside the Central Alarm Station ("CAS"). (Tr. at 611, 716. See also CX-10.) Two cartoons, which were attached to a single page, were posted on the bulletin board inside of Building 121. (Tr. at 612-13; CX-10.) Only a few officers ranked above captain frequented these areas. (Tr. at 829.) Complainant removed the cartoons and did not report this incident to Respondent. (Tr. at 717-18.) There is no record evidence indicating who posted the cartoons. (Tr. at 716-17.) Similarly, there is no reliable evidence as to how long the cartoons were displayed.<sup>185</sup> At best, it appears that one cartoon was displayed for several days. (Tr. at 717.)

Complainant testified that he did not like this activity and he considered it to be adverse. (Tr. at 612-13.) There is no evidence that the posting of the cartoons had a negative impact on Complainant's employment. For instance, there is no testimony that the cartoons impaired Complainant's ability to perform his job, or that Complainant received a less favorable performance rating.

Furthermore, Complainant has failed to establish that the cartoons created a hostile work environment. See Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2 at 45-46 (Sec'y Jun. 14, 1996); Henry v. Guest Serv., Inc., 902 F. Supp. 245, 251-52 (D.D.C. 1995), aff'd, 98 F.3d 646 (D.C. Cir. 1996)(placing offensive cartoon in mailbox was not adverse action). Contrary to Complainant's assertion, the instant case is clearly distinguishable from Smith. See 93-ERA-16. In Smith, cartoons were drawn by a company foreman on a drawing board located in the company lunchroom. See Smith, 93-ERA-16 at 25-26. The lunchroom was frequented by employees and used by the foreman as an office. See id. During a period of several months, at least four or five different cartoons of the complainant were displayed. See id. A cartoon would remain on the bulletin board for a period of time and then be replaced by another cartoon. See id. Upper level managers knew about the repeated, derogatory cartoons and took no action whatsoever to remedy the situation. See id.

Here, Complainant has presented no evidence to show that management personnel orchestrated the posting of the cartoons. Nor has Complainant shown that management personnel knew that Complainant's co-workers were harassing him, yet acquiesced in such a manner as to condone or encourage the activity. Indeed, there is no indication that this was anything other than an isolated incident. Consequently, I find and conclude that the cartoons fail to rise to the level of an adverse action. See Varnadore, 92-CAA-2 at 45-46; Henry, 902 F. Supp. at 251-52. See also Gunnell v. Utah Valley State College, 152 F.3d 1253, 1265 (10th Cir. 1998)(setting forth the standard for determining whether co-worker hostility constitutes intentional retaliation by employer).

### **F. Causal Connection Between Protected Activity and Adverse Employment Action**

Next, Complainant argues that the temporal proximity of his protected activities and the adverse employment actions are sufficient to establish an inference of causation. (CDO at 57-59.) A retaliatory motive may be inferred when an adverse employment action closely follows a protected activity. See Chavez v. City of Arvada, 88 F.3d 861, 866 (10th Cir. 1996). See also Seater, 95-ERA-13 at 15. Hence, the dates of Respondent's adverse actions are key to this inquiry, because the closer that they occurred to Complainant's protected activity, the more likely they will support a showing of causation. See id.

As detailed above in the "preliminary findings of fact and conclusions of law" section, Respondent concedes that temporal proximity exists between Complainant's protected activities and seven adverse employment actions. In addition, Complainant correctly asserts that the proximity of time between the filing of this whistleblower complaint and the request that Complainant acquiesce to the terms of the revised Corrective Action Plan is sufficient to create an inference of retaliatory intent.

The record reveals that Complainant engaged in the protected activity of filing a formal whistleblower complaint on March 26, 1998. (Tr. at 1261. See also CX-128.) The record further reveals that Mr. Cosgrove sought Complainant's compliance with the terms of a revised Corrective Action Plan on April 7, 1998. (CX-129 at MG0332-0333; CX-130 at MG0332- 0333.) Complainant refused to sign the revised Corrective Action Plan and remained on paid administrative leave until the parties signed a Temporary Return to Work Agreement on or about September 25, 1998. (CX-147; Tr. at 632.) The lapse of time between Complainant's protected activity and the adverse action is approximately two weeks. It is well established that a lapse of two weeks is sufficient, standing alone, to establish an inference of causation. See Ramirez v. Oklahoma Dep't of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994)(one and one-half month period may, by itself, establish causation).

Moreover, Complainant claims that his protected activity in October 1997, led to the adverse action in March 1998. Here, the lapse of time between Complainant's protected activity and the adverse action is approximately five months. A lapse of five months is too distant, by itself, to establish an inference of causation. See Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997)(three month period, standing alone, is insufficient to establish causation). Nevertheless, Complainant may rely on additional evidence beyond temporal proximity to establish an inference of causation. See Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999); Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997).

Complainant has introduced sufficient evidence to establish a nexus between his protected disclosures to CBS News in September or October 1997, and Mr. Cosgrove's threatened disciplinary actions in March 24, 1998. Here, Mr. Cosgrove became aware of Complainant's participation in the CBS News team investigation on or about October 28, 1997. (Tr. at 1242; CX-109.) On November 6, 1997, Mr. Cosgrove asked Complainant to

respond to a series of questions concerning his compliance with the classification review procedures and the potential release of classified information to CBS News. (CX-111; Tr. at 626, 1243-44.) In a written response, Complainant conceded that the Contractor Classification Office had not reviewed said information. (CX-110 at W0128.) The CBS News story was aired on November 24 and 25, 1997. (Tr. at 1247.)

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In late November or early December 1997, Mr. Cosgrove initiated an administrative investigation into whether Complainant had released "classified, sensitive, or proprietary information" to the news media. (CX-119 at 1, 10. See also Tr. at 1243, 1247-48, 1326-27.) In late January 1998, Respondent's internal investigators informed Mr. Cosgrove that Complainant had refused to answer a few questions soliciting specific information about the content of Complainant's disclosures to CBS News. (Tr. at 1248; CX-119.)

Hence, Mr. Cosgrove held a second meeting with Complainant on January 28, 1998. (Tr. at 951-53, 965-66, 1247; CX-120, 121.) At this time, Mr. Cosgrove personally requested that Complainant answer the questions and explained that the answers would not be used against him in any type of criminal proceeding. (Tr. at 1248-49.) He further explained that Complainant's failure to answer the questions could lead to disciplinary action, including termination. (Tr. at 1249.) Complainant responded by providing detailed information in writing. (Tr. at 1249; CX-121, CX-120 at W0233.) In addition, Complainant acquiesced to Mr. Cosgrove's suggestion that he voluntarily participate in the Employee Assistance Program ("EAP"). (Tr. at 1254-56, 1263-64; CX-120 at W0234; CX-121.)

On January 31, 1998, Complainant was placed on paid administrative leave pending the results of the psychological evaluation. (CX-122.) On February 27, 1998, Dr. Furman notified Respondent that Complainant was fit for duty and suitable for return to work. (CX-123 at MG0109.)

On March 24, 1998, Mr. Cosgrove met with Complainant to discuss his return to work. (CX-126.) At that time, Complainant was presented with a Corrective Action Plan and a disciplinary letter. (Tr. at 897-904, 1252, 1265-67; CX-13 at MG0103-MG0104; CX-124, 125.) Said documents contained unrealized threats of disciplinary action. (Tr. at 897-904, 1252, 1265-67; CX-13 at MG0103-MG0104; CX-124, 125.) Complainant refused to comply with the terms of the Corrective Action Plan unless Respondent accepted the terms of a handwritten addendum. (CX-125 at MG0390. See also CX-126 at W0196.) Mr. Cosgrove found the addendum to be unacceptable, and, as such, ordered Complainant to remain on paid administrative leave until further notice. (CX-127, 128.)

Based on the foregoing, I find and conclude that the series of events stemming from Complainant's protected disclosures to CBS News in September or October 1997, to Mr. Cosgrove's threatened disciplinary actions in March 24, 1998, are sufficiently interrelated to establish an inference of retaliatory motive. Nevertheless, Complainant still has the

burden of proving by a preponderance of the evidence that Respondent's proffered reasons for the adverse employment actions are pretextual. See Jackson v. Ketchikan Pulp Co., 93-WPC- 7 at 5 (Sec'y Mar. 4, 1996).

### **G. Pretext**

Under the McDonnell Douglas pretext analysis, Complainant must either show that an unlawful reason more likely motivated Respondent, or show that the proffered explanation is not worthy of credence. See Nichols v. Bechtel Constr., Inc., 87-ERA-44 at 13 (Sec'y Oct. 26, 1992)(as corrected by Errata Order on Oct. 30, 1992). Indeed, a complainant may establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder [sic] could rationally find them unworthy of credence and hence infer that the [respondent] did not act for the asserted nondiscriminatory reasons." Anderson, 181 F.3d at 1179 (citing Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997)).

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#### **1. Overtime Assignments in December 1995; Reassignment in April 1996; and Reduction in Meeting Attendance**

First, Complainant alleges that his protected activity led Respondent to retaliate against him by: (a) assigning him excessive overtime hours in December 1995; (b) reassigning him from a program management position to a shift supervisor position in April 1996; and (c) reducing his participation in meetings and interface with the planning and maintenance departments. The evidence does not support these allegations. Rather, the evidence supports a finding that these changes were the result of corporate downsizing or a reduction-in-force.

##### **a. Overtime Assignments in December 1995**

In early 1995, Complainant was one of two Central Alarm Station ("CAS") lieutenants that was assigned administrative and operational duties. (Tr. at 562- 64, 798, 1173-74.) The other lieutenant was Mr. Angelo. (Tr. at 564, 1173.) In this capacity, their primary responsibilities were carried out during a forty-hour, five-day work week. (Tr. at 562-64, 798, 1173-74.) In addition, they received overtime assignments on the twelve-hour shift. (Tr. at 564, 798-99, 814-15, 1174.) They would generally receive overtime assignments when there was an insufficient number of shift supervisors due to vacations, sick leave, personal emergencies, and reductions-in-force. (Tr. at 799.) It appears that Complainant was regularly assigned a substantial amount of overtime, because when the compensation system was changed on March 20, 1995, and overtime compensation was factored into his salary, his annual salary was increased by 55%. (See CX-15 at W0130, W0132.) Indeed, Complainant testified that there were periods when the CAS operation employees were required to work eighty-hour weeks. (Tr. at 581.)

In approximately September 1995, Mr. Angelo was assigned to "backfill" a shift supervisor position. (Tr. at 1173, 1199.) Due to a reduction-in-force, Mr. Angelo remained in this position until March 1999. (Tr. at 1173, 1180, 1194.) Consequently, Complainant assumed Mr. Angelo's shift relief responsibilities, and his shift assignments increased. (Tr. at 579, 1173.) In December 1995, Complainant was the only shift relief lieutenant. (Tr. at 579.)

Complainant contends that he received "what seemed to be an exorbitant amount of overtime" in December 1995, in retaliation for writing the letter to Congressman Skaggs.<sup>186</sup> (Tr. at 694.) Respondent concedes that Complainant worked a lot of overtime in December 1995, however, Respondent argues that the overtime assignments were the result of corporate downsizing. Indeed, Respondent has introduced credible evidence showing that the overtime assignments were the result of an increasing need for CAS supervisors and the lack of qualified personnel to fill the shift supervisor positions. (See, e.g., RX-M; Tr. at 794-97, 804, 1173-74, 1176, 1195-96. Accord Tr. at 1101, 1111; CX-144.)

In examining this issue, I must consider conflicting evidence concerning (1) the number of hours assigned to similarly situated employees; and (2) the availability of other certified and qualified employees to perform the shift assignments.

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*(1) Hours Worked by Similarly Situated Employees*

First, I must determine the number of hours that Complainant worked in December 1995. Although the uncontroverted evidence supports a finding that Complainant received a lot of overtime assignments in December 1995, there is conflicting evidence as to the number of hours that Complainant actually worked. (See Tr. at 579-80; CX-86 at MG0518; RX-M. See also RDO at 12-13, 20.) Complainant testified that he worked over 260 "shift only" hours in December 1995.<sup>187</sup> (Tr. at 579-80 (emphasis added).) In contrast, the Final Inquiry Report relative to Mr. Peters' whistleblower complaint states that Complainant "worked a total of 262 hours" in December 1995. (CX-86 at MG0518 (emphasis added).) Yet, Respondent's crew sheets indicate that Complainant worked 175 shift hours and approximately 228 total hours in December 1995. (See RX-M.)

As previously discussed, I do not find Complainant's self-serving testimony to be credible absent corroborating evidence. I further find that Complainant's testimony conflicts with the findings contained in the Final Inquiry Report, which was based in part on Complainant's representations. (See CX-86 at MG0502, MG0513, MG0518. See also Tr. at 696, 713, 821-22.) Complainant testified that the 260 hour figure represented "shift only" hours, however, the 262 hour figure in the Final Inquiry Report allegedly represents the "total" number of hours (shift and administrative hours) that Complainant worked. (Compare Tr. at 579-80 with CX-86 at MG0518.) I further find that there is no credible evidence to support a finding that the DOE/OPM investigators consulted Respondent's



payroll records and confirmed that Complainant "worked a total of 262 hours" in December 1995. (See CX-86.) Therefore, I find and conclude that Respondent's crew sheets and time cards are the best evidence of Complainant's work load during this time period. (See RX-M.) Accordingly, I find that Complainant worked 175 shift hours and approximately 228 total hours in December 1995. (See RX-M.)

Second, I must determine whether Complainant was treated differently than the similarly situated employees. Since Complainant was the only administrative lieutenant in December 1995, and the record reveals that the shift supervisors were capable of performing shift relief work, the shift supervisors shall be considered similarly situated employees for the purposes of this analysis. (See Tr. at 1174. See also Tr. at 579-80, 701.)

Here, there is conflicting evidence concerning the number of hours assigned to the shift supervisors in December 1995. (Compare Tr. at 581-82 with RX-M.) Although Complainant conceded that he did not keep track of the number of hours that the other officers worked, he opined that he worked 90 to 100 hours more than the other officers worked in December 1995. (Tr. at 581-82.) However, Complainant's testimony is not supported by corroborating evidence, and it appears to be based on mere speculation. Therefore, I find that Complainant's testimony is not worthy of credit.

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Rather, I find that Respondent's crew sheets and time cards are the best evidence of the hours worked by similarly situated employees. (See RX-M.) Respondent's records indicate that Mr. Angelo worked a comparable number of hours in December 1995. (See RX-M.) Specifically, the combined payroll records show that Mr. Angelo worked a total of 232.5 hours and that Complainant worked a total of 227.5 hours in December 1995. (RX-M.) Furthermore, the combined payroll records for the three month period beginning November 1995, and ending January 1996, indicate that four-of-the-five shift lieutenants worked more hours than Complainant. (RX-M.) This evidence clearly establishes that Complainant was not being treated differently than the other CAS lieutenants in December 1995.

## *(2) Availability of Qualified Persons*

Finally, I must determine whether there were other certified and qualified employees available to perform the overtime assignments that Complainant received in December 1995. The uncontroverted evidence reveals that the following shift supervisors were certified and qualified to perform relief work: Messrs. Angelo, Couper, Cseh, and Pomeroy. (Tr. at 579-80.) In addition, Complainant asserts that his manager, Mr. Walsh, and his captain, Mr. Leach, were also certified and qualified to perform shift relief work. (Tr. at 579-80.)



Here, I find that Respondent has offered credible evidence to support its position that Messrs. Leach and Walsh were not qualified to fill the vacancies in the shift. (See Tr. at 803-04.) In reaching this conclusion, I have credited the testimony of Mr. Leach stating that he was not qualified to relieve the shift supervisors because he lacked the technical expertise and he was not armed.<sup>188</sup> (Tr. at 803-04.) Likewise, I credit Mr. Leach's testimony that Mr. Walsh was not qualified because he was not armed. (Tr. at 804.) This evidence is corroborated by Mr. Angelo's testimony that neither Mr. Leach nor Mr. Walsh were members of the set pool of shift relief employees.<sup>189</sup> (Tr. at 1174.)

I further find that the amount of leave taken by shift supervisors in December 1995, tends to corroborate Respondent's position that there was an extraordinary amount of shift relief work in December 1995. (RX-M.) For instance, Messrs. Couper, Chamberlain, and Cseh took vacation leave in December 1995.<sup>190</sup> (RX-M; Tr. at 580.) Similarly, Mr. Pomeroy took sick leave and attended several days of military training. (RX-M.) In addition, Mr. Angelo had been assigned to backfill a vacancy on the "B night shift" in September 1995, and, as such, was not readily available to assist with shift relief work. (RX-M; Tr. at 1173.) It is also apparent from the record evidence that shift supervisors have a limited ability to perform relief work for other supervisors, due to the inherent nature of shift work. For example, if a supervisor assigned to a twelve-hour day shift was assigned to relieve a supervisor assigned to the subsequent twelve-hour night shift, he would be required to work an entire twenty-four-hour period. Moreover, the above-mentioned evidence is consistent with Mr. Walsh's explanation at the time. (Tr. at 579-81, 694; CX-144.) Indeed, Complainant testified that he had been informed that no assistance was available because of holiday and vacation schedules. (Tr. at 579-81.)

Accordingly, and based on the foregoing, I find that Complainant has failed to prove by a preponderance of the evidence that he received the overtime assignments in December 1995, in retaliation for his protected activity. Rather, I find and conclude that the overtime assignments were made because there was an insufficient number of qualified persons available to handle the volume of relief work that was required to be performed in December 1995.

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*b. Reassignment in April 1996, and Reduction in Meeting Attendance*

Similarly, Complainant asserts that he was reassigned from a program management position to a shift supervisor position in April 1996, in retaliation for his protected activity. Complainant also argues that the reassignment had a chilling effect on his whistleblower activities because his access to information, participation in meetings, and interface with the planning and maintenance departments decreased. (CDO at 68-69.)

The uncontroverted evidence establishes that Mr. Angelo, like Complainant, was reassigned from a program management position with a five-day work week, to a supervisor position with a twelve-hour shift rotation schedule. (Tr. at 1173.) The record

establishes that Respondent was implementing cutbacks at the time of Mr. Angelo's reassignment, and that Complainant's reassignment followed approximately six months later. (See Tr. at 583, 709-10, 1173, 1994. See also Tr. at 795, 804.) Hence, the evidence indicates that Complainant was not treated differently than similarly situated employees.

The record also supports a finding that Complainant was assigned to fill a shift supervisor position vacated by Mr. Couper, because Respondent was continuing to experience financial cutbacks. (See, e.g., CX-144.) In making this finding, I credit the testimony of Mr. Leach that Complainant was transferred to the twelve-hour shift to "backfill" a shift supervisor position. (Tr. at 804. See also CX-2 at MG009; CX-144; Tr. at 813.) I also credit the testimony of Mr. Gillison that Respondent was experiencing "significant costs cuts" and was lacking competent shift supervisors. (Tr. at 1101, 1111.) Moreover, Complainant conceded that his administrative duties were reassigned to Mr. Leach, with assistance from the shift lieutenants, and that this would have been the normal practice in a reduction-in-force situation. (Tr. at 710-11.)

Complainant seeks to rebut these showings by arguing that the instant case is analogous to Scerbo v. Consolidated Edison Co. of New York, 89-CAA-2 (Sec'y Nov. 13, 1992). In Scerbo, however, the complainant relied on more than temporal proximity to establish pretext. 89-CAA-2. Indeed, the trier of fact determined that the employer's evidence was inconsistent and not worthy of credit. See id. Here, I find that Respondent has offered credible evidence that Complainant's reassignment was the result of corporate downsizing. Moreover, Respondent has introduced credible evidence showing that Complainant was treated the same as Mr. Angelo, the only similarly situated employee.

Complainant also relies on the Final Inquiry Report relative to Mr. Peters' whistleblower complaint, which provides in part:

It appears a chilling effect may be created by WSI in that those who are supporting or interacting with Peters are now under investigation. . . . [Graf] was reassigned in early 4/96 to a line supervisory position and removed from his former duties which allowed access to the classified security information regarding SNM protection and movement.

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(CX-86 at MG0518.) However, I do not find this evidence persuasive. First, the Final Inquiry Report does not appear to be based on complete evidence. For instance, the Report makes no mention of Mr. Angelo's reassignment. (See CX-86.) Second, I find that the shift supervisor position, by its very nature, impaired Complainant's ability to interface with the planning and maintenance operations. (See Tr. at 585-87.) Finally, the fact that Complainant and Mr. Angelo were both "demoted" to shift supervisor positions diminishes any potential "fear" by fellow employees that they may be retaliated against for engaging in protected activities. (See CDO at 70.)

Accordingly, and based on the foregoing, I find and conclude that Complainant has not established by a preponderance of the evidence that Respondent acted with retaliatory animus when it reassigned him to the shift supervisor position in April 1996. I further find and conclude that the shift supervisor position, by its very nature, limited Complainant's ability to attend meetings and interface with the planning and maintenance departments. (See Tr. at 585-87.)

### 3. Adverse Actions After Complainant's Disclosure to CBS News

Complainant also argues that Respondent was motivated by unlawful reasons when it took adverse employment actions against him after he disclosed site safety and security information to CBS News. The following adverse actions are at issue here: (a) threatening to take disciplinary action against Complainant on January 28, 1998; (b) asking Complainant to voluntarily report to the Employee Assistance Program ("EAP") for evaluation on January 28, 1998; (c) placing Complainant on paid administrative leave on January 31, 1998; (d) removing Complainant from his Personal Security Assurance Program ("PSAP") position in February or March 1998; (e) threatening to issue a one-day suspension without pay on March 24, 1998; (f) attempting to solicit Complainant's compliance with the terms of the Corrective Action Plan dated March 24, 1998; (g) refusing to accept the terms of Complainant's addendum to the Corrective Action Plan dated March 24, 1998; (h) ordering Complainant to remain on paid administrative leave; and (i) attempting to solicit Complainant's compliance with the terms of the revised Corrective Action Plan dated April 7, 1998.

Respondent argues that these actions were the result of Complainant's knowing violation of a DOE classification order and his refusal to follow site disclosure rules in the future. (RDO at 22.) Although Complainant concedes that he had knowledge of the classification review policy before he communicated with CBS News, he asserts that Respondent's reasons are pretextual because (a) Respondent had not enforced the classification review policy in the past; (b) Respondent was concerned about the negative publicity generated by his disclosures; (c) Complainant failed to follow Respondent's internal chain of command before making said disclosures; and (d) Complainant was not a "team player." (CDO at 64-83.)

#### a. Classification Policies and Procedures

One of the central issues in this case is whether Complainant violated a classification policy or procedure when he failed to request that either the Contractor Classification Office or the DOE Classification Office review potentially classified information before disclosing said information to Mr. Peters and representatives of CBS News. The record contains numerous documents pertaining to site classification policies and procedures. (See, e.g., CX-8, 12, 20, 40, 80, 88, 92, 117, 132; RX-A, B.)

*(1) DOE Order No. 5650.2B*

Chapter V, Part G, of DOE Order No. 5650.2B sets forth the classification review procedures for "all documents originated by DOE or DOE contractor personnel who possess valid security clearances." (CX-20.) Subsection 2(d) expressly provides:

d. Oral Presentations. The review requirements described in subparagraphs a, b, and c,<sup>191</sup> above, are also applicable to any oral presentations, including speeches, briefings, or interviews, to be made by DOE or DOE contractor personnel. Whenever possible, the speakers should use prepared texts, reviewed in accordance with the requirements outlined above. When such prior review is not possible, or when extemporaneous remarks are likely, local DOE or DOE contractor classification office representatives will prebrief the speaker on classification guidance pertinent to the presentation subject matter, including danger areas in post-presentation discussions.

(CX-20 (emphasis added).)

Authorized derivative classifiers are not exempt from the requirements set forth in DOE Order No. 5650.2B. (CX-20; Tr. at 48, 85. See also CX-88 at MG2489- 2490.) Hence, prior to making a public disclosure, an ADC is required to have all Category II and Category III information<sup>192</sup> reviewed by the DOE Classification Office or the Contractor Classification Office. (Tr. at 48-49, 85; CX-139 at 92-93. See also RX-A, CX-20.) The responsibility for determining whether the information has the potential of falling within the definitions of Categories II or III rests with the person that is generating or using the information. (Tr. at 40-41, 87. See also Tr. at 864.)

The policies set forth in DOE Order No. 5650.2B are also embodied in other documents such as Kaiser-Hill Directive CAHW-001-96, and Respondent's Security Manual, (CX-80, 88. See also CX-8, 40.)

*(a) Violation of Order*

Even though a sincere belief that Complainant violated a company policy may be sufficient for Respondent to avoid liability under the Act, I will determine whether an actual violation occurred because this issue has been heavily litigated in this matter. See, e.g., Dartey v. Zack Co. of Chicago, 82-ERA-2 at 7 (Sec'y Apr. 25, 1983)(citing Jeffries v. Harris County Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980))(holding that where an employer wrongly believes an employee has violated a company policy, it does not discriminate in violation of the ERA if it acts on that belief).

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The evidence establishes that Complainant (1) was employed by a DOE subcontractor; (2) had a "Q" level security clearance; (3) was interviewed by CBS News personnel; (4)

disclosed Category II or Category III information to Mr. Peters and CBS News personnel; (5) did not use a prepared text; and (6) made extemporaneous remarks concerning site security and safety issues. (Tr. at 47, 54, 166-67, 562, 568, 620-21, 624, 651-52, 683, 854; CX-118, 119.) Thus, under the plain language of DOE Order No. 5650.2B, Complainant was required to participate in a briefing with a DOE or Contractor Classification Office representative prior to releasing the potentially classified information to CBS News personnel and Mr. Peters.

I find no merit to Complainant's assertion that the applicability of DOE Order No. 5650.2B should be limited to the review of information contained in "documents." (CDO at 76-79.) Although the title and introductory proviso of Part G refer to "newly generated documents," it would be inappropriate to use this wording to read out the plain meaning of Subsection 2(d), which sets forth the classification review procedures for oral communications. In examining DOE Order No. 5650.2B as whole, it is clear that classified information, documents, and material are to be protected. See Identification of Classified Information, DOE Order No. 5650.2B (Dec. 31, 1991), as amended, Apr. 28, 1993; JX-1.<sup>193</sup> This is consistent with the policy of protecting national security by preventing or reducing the likelihood that classified information will be inadvertently released through written or oral communications. (See JX-1; Tr. at 122.) Moreover, Mr. Siebert testified that the term "newly generated" does not mean "newly written." (Tr. at 133-34, 165.) Hence, interpreting DOE Order No. 5650.2B as applying only to written communications, as Complainant suggests, would be contrary to the plain meaning of the Order.

Next, Complainant argues that his disclosures fall within a "personal opinion" exception to DOE Order No. 5650.2B. (CDO at 73-78.) Although the evidence establishes that an individual may express his "personal opinion" about a subject that has no possibility of generating classified information (i.e., Category I information) without seeking classification review, Complainant engaged in an activity with the possibility of generating classified information. (Tr. at 37-38, 47, 90-110, 166-67.) Again, this policy is based upon the need to avoid the inadvertent release of classified information. (Tr. at 38.) Thus, Complainant's disclosures to CBS News and Mr. Peters did not fall within this narrow "personal opinion" exception.

To the extent that Mr. Cunningham employed a more liberal interpretation of the "personal opinion" exception, the evidence reveals that neither Mr. Cosgrove nor Complainant were aware of such an exception.<sup>194</sup> (Tr. at 618, 1297-98, 1332.) Consequently, the "white paper" containing the "personal opinion" exception could not have been a motivating factor for either Mr. Cosgrove's or Complainant's actions.

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Finally, I find Complainant's argument that no classified information was actually released to be unpersuasive. DOE Order No. 5650.2B requires employees to have potentially classified information reviewed prior to making public disclosure of said

information. (See CX-20; JX-1.) Since the underlying policy is to protect national security by avoiding the inadvertent release of classified information, the advance review requirement is reasonable. (See Tr. at 38, 54, 166-67.) Moreover, Complainant concedes that punishing a person after classified information has been inadvertently released is a rather ineffective means of preventing the dissemination of said information. (Tr. at 683.) Accordingly, and based on the foregoing, I find and conclude that Complainant violated the classification review procedures set forth in Chapter V, Part G of DOE Order No. 5650.2B.

Even assuming, arguendo, that Respondent wrongly believed that Complainant violated the classification review policy, I find that Respondent's general manager and its internal investigators sincerely believed that Complainant had violated said policy. (See Tr. at 853, 856, 862-66, 1242-43, 1309-11; CX-111, 119. See also Tr. at 947-50, 1212- 1213, 1215, 1231-32; CX-13, 125, 129, 130.) Respondent's sincere belief is sufficient under the Act. See Dartey, 82-ERA-2 at 7.

*(b) Knowing Violation of Order*

I further find that Complainant knowingly violated the classification review procedure. The record reveals that Complainant was aware of the policy requiring employees to go through the Classification Office before releasing information to the media. (Tr. at 620, 646; CX- 118, 119.) Complainant had been instructed that ADC's were not authorized to approve information for public release. (Tr. at 668-69. See also CX-118 at MG0375; CX-119.) Nevertheless, Complainant chose not to contact the DOE Classification Office or the Contractor Classification Office prior to releasing the potentially classified information to CBS News personnel and Mr. Peters. (Tr. at 674.)

I am not persuaded by Complainant's argument that he was not required to follow site classification review procedures because Mr. Cunningham did not want to review information that was in Mr. Peters' personal possession. It is unreasonable for Complainant to conclude, based upon the wording of the Long & Jaudon letter, that he was exempt from the site classification review policy. (See CX-92; Tr. at 157-58.) Indeed, there was nothing that precluded Complainant from having his own information properly reviewed. (See CX-92.) In making this finding, I do not credit Complainant's argument that such a review would be worthless without Mr. Peters' information. (Tr. at 743-45.) Complainant contends that a review of his material would have been "incomplete" because it would not have contained information in Mr. Peters' possession. (Tr. at 743-44.) Even assuming this to be true, I find no merit to the argument that no review is better than an incomplete review. Hence, I find and conclude that Mr. Cosgrove reasonably believed that Complainant had made a conscious decision not to follow the classification review policy prior to disclosing the potentially classified information to CBS News. (See Tr. at 1251.)



*(c) Past Enforcement of Order*

Nevertheless, Complainant makes a compelling argument that Respondent had not enforced the classification review policy in the past. (CDO at 70-73.) The evidence shows that Complainant was not disciplined for making past disclosures of potentially classified information to the public. (See, e.g., Tr. at 619.) Likewise, other employees had not been disciplined for failing to go through the Classification Office prior to disclosing site safety information to the public. (See, e.g., Tr. at 1005-12.) It is important, however, that these activities took place while Mr. Gillison was serving as Respondent's general manager. (Tr. at 993, 1113.)

The fact that Mr. Cosgrove assumed the general manager position several months before the CBS News incident is critical to this analysis. (Tr. at 616, 657, 1208, 1213-14, 1279.) Mr. Cosgrove brought with him a strong belief that the site policies and procedures should be enforced. (Tr. at 947-49, 1212-1213, 1215, 1231-32.) Approximately one month after joining RFETS, Mr. Cosgrove held a series of "all-hands meetings" with Respondent's salaried and hourly employees. (Tr. at 949-50, 1231-32.) During these meetings, Mr. Cosgrove emphasized the importance of following the site rules, regulations, and policies. (Tr. at 950-51.) He warned employees that the site policies and procedures would be enforced and that violators would be held accountable for their actions. (Tr. at 950-51, 1231-32.) Complainant attended one of these meetings prior to making his disclosures to CBS News. (Tr. at 1232.)

Moreover, Complainant has not offered any credible evidence to establish that Mr. Cosgrove knew that the classification review policy had not been enforced by Mr. Gillison.<sup>195</sup> Indeed, Complainant concedes that he did not tell Mr. Cosgrove that the classification review policy had not been enforced against him in the past. (Tr. at 648-49.) Rather, Complainant relied on the Long & Jaudon letter and his ADC certification to justify his actions. (CX-119; Tr. at 648.)

I further find no merit to the argument that Mr. Cosgrove failed to investigate whether Complainant had followed the classification review policy after the Denver Post article was published. (See Tr. at 1233-24, 1305-06; CX-97.) First, Complainant was unable to recollect whether he had asked the Contractor Classification Office to review the information that he intended to release to the Denver Post. (Tr. at 613.) Second, I find credible Mr. Cosgrove's testimony that he was unaware that the classification review policy was an issue at RFETS, and that he had assumed that Complainant had requested guidance from the Classification Office before making his disclosures to the Denver Post. (Tr. at 1233-34, 1236, 1316, 1318, 1321, 1325-26, 1339.) Finally, I note that the all-hands meetings were held after the Denver Post article was published on May 20, 1997. (Tr. at 606, 608.) This timing is important because management should be entitled to change its internal policies and procedures, or its enforcement thereof, provided that said changes are equally enforced against all employees. I also find Respondent's need to enforce the DOE's classification policy to be very compelling.



Similarly, I am not persuaded by the argument that Mr. Cosgrove failed to follow site classification review procedures before he was deposed in this matter. Although Mr. Cosgrove did not personally contact the Contractor Classification Office, the evidence indicates that Ms. Bange was coordinating the discovery requests for Respondent. (Tr. at 1356-57, 1362; 1399- 1402; See also Tr. at 1294-96.) In this capacity, Ms. Bange discussed the nature of this case with Mr. Cunningham and was advised that the presence of a classifier was not required for depositions in this matter. (Tr. at 1402.)

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Accordingly, I find and conclude that Mr. Cosgrove's actions were motivated, at least in part, by Complainant's knowing violation of the site disclosure and classification rules.

*(d) Refusal to Follow Policy in Future*

The record also reveals that Mr. Cosgrove's actions were at least partially motivated by Complainant's refusal to follow the site classification review policy in the future. Indeed, Complainant concedes that he has refused to abide by Mr. Cosgrove's request that he follow the classification review policy in the future. (Tr. at 649; See also Tr. at 1253-54.) I also credit Mr. Cosgrove's testimony that Complainant was not immediately reinstated to his CAS shift lieutenant position because he had refused to abide by classification rules in the future. (Tr. at 1253- 54, 1264-65.) Therefore, I find and conclude that Mr. Cosgrove's action of ordering Complainant to remain on paid administrative leave was motivated, at least in part, by Complainant's refusal to follow site classification review policy in the future.

*b. Chain of Command; Team Player*

The record also supports a finding that Respondent's actions were partially motivated by Complainant's failure to follow the chain of command. (See, e.g., Tr. at 1340, 1365-67; CX-13 at MG0104-0105; CX-125; CX-129 at MG0332-0333; CX-130 at MG0332-0333. Accord CX-120, 126.) It is well settled that an employee's failure to observe the chain of command in making protected disclosures cannot serve as a legitimate ground for an employer's adverse action. See Fabricius v. Town of Braintree/Park Dep't, 97-CAA-14 at 4 (ARB Feb. 9, 1999); Talbert v. Washington Pub. Power Supply Sys., 93-ERA-35 at 7 (ARB Sept. 27, 1996); Leveille, 94-TSC-3/4 at 9; Carson v. Tyler Pipe Co., 93-WPC-11 at 8 (Sec'y Mar. 24, 1995); West v. Systems Applications Int'l, 94- CAA-15 (Sec'y Apr. 19, 1995). Disciplining an employee for failing to follow the chain of command when making safety complaints seriously undermines the purpose of the ERA. See id.

Here, the Corrective Action Plan and revised Corrective Action Plan explicitly required Complainant to "adhere to the chain of command in all issues that pertain to this company and the security of this site." (CX-125 at MG0389; CX-129 at MG0332; CX-130 at MG0332. See also CX-130 at MG0333.) Since the Contractor Classification

Office is not part of Complainant's chain of command,<sup>196</sup> this language cannot be construed as encouraging Complainant to abide by the classification review policy. (Tr. at 627, 1340, 1343.) Therefore, I find that Complainant has submitted evidence which establishes that Mr. Cosgrove was partially motivated by this illegitimate criterion. (CX-13 at MG0104-0105; CX-125; CX-129 at MG0332-0333; CX-130 at MG0332-0333.)

Similarly, I find that Respondent's actions were partially motivated by Complainant's failure to be a "team player." Although "[a]n employer's expectation that an employee interact with others in the company as a 'team player' does not constitute a proscribed criterion per se[,] . . . the extension of that expectation to a point where it interferes with protected activity is prohibited." Timmons v. Franklin Elec. Coop., 1997-SWD-2 at 6 (ARB Dec. 1, 1998). See also Odom v. Anchor Lithkemko/Int'l Paper, 96-WPC-1 at 12 (ARB Oct. 10, 1997). The record reveals that Respondent's desire to have Complainant be a team player was closely intertwined with Respondent's desire to have Complainant follow the internal chain of command. (See, e.g., Tr. at 1253, 1340, 1365-67. Accord CX-120.) Indeed, Mr. Cosgrove encouraged Complainant to become a member of his team and work internally to resolve his safety and security concerns, rather than take his concerns to the media. (See, e.g., Tr. at 1253, 1365-67. Accord CX-120.) Hence, I find that Mr. Cosgrove intended to dissuade Complainant from engaging in protected activity when he encouraged Complainant to become part of his "team." Such behavior is impermissible under the Act because it has a chilling effect on Complainant's protected activity.

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Based on the foregoing, I find and conclude that Respondent's actions were motivated by both legitimate and illegitimate motives. Accordingly, these adverse actions must be evaluated under a "dual motive" analysis where Respondent "'bears the risk that the influence of legal and illegal motives cannot be separated.'" Zinn v. University of Missouri, 93-ERA-34 (Sec'y Jan. 18, 1996)(quoting Mackowiak, 735 F.2d at 1164. See also Yule, 93-ERA-12 at 4.

#### 4. Mr. Angelo's Reassignment in March 1999

Finally, Complainant argues that his protected activity led Respondent to reassign Mr. Angelo, rather than Complainant, to a more favorable supervisory position. Respondent contends that the decision to reassign Mr. Angelo to a more favorable position was based on valid business reasons. (RDO at 26.) First, Respondent argues that Complainant and Mr. Angelo were equally well qualified for the administrative position. (RDO at 26.) Second, Respondent contends that Mr. Angelo is more of a "people person." (RDO at 26.)

In March 1999, Mr. Angelo was removed from his shift supervisor position and assigned to a Central Alarm Station supervisor position. (Tr. at 1168.) As a result, Mr. Angelo was relieved of his shift responsibilities and was assigned to a five-day work

week. (Tr. at 1180.) The evidence reveals that Mr. Angelo's new position is substantially similar to the program management positions previously occupied by Complainant and Mr. Angelo. (Compare Tr. at 1169, 1180, 1201, with Tr. at 562-64.) Accordingly, I find the Central Alarm Station supervisor position to be a more favorable position than the shift supervisor position.

I further find that both Complainant and Mr. Angelo are equally well qualified for the Central Alarm Station supervisor position. (See, e.g., Tr. at 813, 818, 1170-71, 1180.) The record reveals that both gentlemen had received similar efficiency ratings. (Tr. at 813, 818.) In addition, I credit Mr. Angelo's testimony that he possesses stronger interpersonal skills and Complainant possesses stronger technical skills. (Tr. at 1170-71, 1201-02.) Mr. Angelo has also taken college level courses toward a degree in business administration, which may make him better suited for a management position. (Compare Tr. at 1181-82 with Tr. at 650-51.)

Nevertheless, the evidence indicates that Complainant was considered to be senior to Mr. Angelo in September 1995. (See Tr. at 1173.) For instance, Mr. Angelo was the first person to be reassigned from a program management position to a less favorable shift supervisor position.<sup>197</sup> (Tr. at 795, 804, 1175.) This fact gives rise to an inference that Complainant had greater seniority than Mr. Angelo in 1995, and it corroborates Complainant's testimony that he was the senior lieutenant. (Tr. at 709- 10.) Moreover, Mr. Angelo testified that Complainant had been promoted to "lieutenant" before himself. (Tr. at 1183.)

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Following this reasoning, Complainant should have been the first lieutenant to be reassigned to the more favorable Central Alarm Station supervisor position in 1999. However, Mr. Angelo was reassigned instead. (Tr. at 1168-69.) Therefore, it appears that Complainant's protected activity either directly or indirectly affected his ability to receive this reassignment. It is likely that Complainant's eight month absence from the site, while he was on paid administrative leave, jeopardized his chances of securing the more favorable position. I further find, hereinafter, that Complainant was placed on paid administrative leave in violation of the ERA. Hence, I find and conclude that Complainant has established that Respondent's reasons for reassigning Mr. Angelo, rather than Complainant, to the Central Alarm Station supervisor position are pretextual.

### **H. Dual Motive**

Under the dual motive analysis, Complainant must demonstrate by a preponderance of the evidence that Respondent took the adverse employment actions, at least in part, because Complainant had engaged in protected activity. See Talbert, 93-ERA-35 at 3; Zinn, 93-ERA-34; Yule, 93-ERA-12 at 4. If Complainant establishes that Respondent's actions were partially based on an illegal motive, the burden shifts to Respondent to demonstrate by clear and convincing evidence that it would have taken the same action in

the absence of the protected activity. See id. See also 42 U.S.C. § 5851(b)(3)(D); Adjiri, 97-ERA-36 at 8 n.7.

As previously discussed in the pretext analysis, Complainant has successfully established that his protected activity was a contributing factor in Respondent's actions of: (a) threatening to take disciplinary action against Complainant on January 28, 1998; (b) asking Complainant to voluntarily report to the Employee Assistance Program ("EAP") for evaluation on January 28, 1998; (c) placing Complainant on paid administrative leave on January 31, 1998; (d) removing Complainant from his Personal Security Assurance Program ("PSAP") position in February or March 1998; (e) threatening to issue a one-day suspension without pay on March 24, 1998; (f) attempting to solicit Complainant's compliance with the terms of the Corrective Action Plan dated March 24, 1998; (g) refusing to accept the terms of Complainant's addendum to the Corrective Action Plan dated March 24, 1998; (h) ordering Complainant to remain on paid administrative leave; and (i) attempting to solicit Complainant's compliance with the terms of the revised Corrective Action Plan dated April 7, 1998.

I further find that Respondent has not presented clear and convincing evidence that it would have taken the same employment actions if Complainant had not engaged in the protected activity. Even though I find that Respondent had decided to enforce the classification policy prior to Complainant's communication with CBS News, Complainant's protected activity and the policy violation cannot be separated. Here, if Complainant had not disclosed site safety and security information to CBS News, Respondent would not have disciplined Complainant for failing to abide by the site classification review policy prior to making said disclosures. Accordingly, I must conclude that Respondent violated the ERA when it took the above-mentioned employment actions against Complainant.

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## **V. REMEDIES**

Having found Respondent in violation of the ERA, the undersigned administrative law judge is required to issue a preliminary order, effective immediately, awarding affirmative action to abate the violation. See 42 U.S.C. § 5851(b)(2)(B)(ii); 29 C.F.R. § 24.7(c)(2). See also Overall v. Tennessee Valley Auth., 97-ERA- 53 at 2 (ARB Apr. 27, 1998). In addition, the undersigned may issue a recommended order on the appropriateness of compensatory damages, which is not effective until the Administrative Review Board issues a final decision in this matter. See 29 C.F.R. § 24.7(c)(2). See also 42 U.S.C. § 5851(b)(2)(A). Complainant may also recover costs and expenses, such as attorneys' fees and costs, that were reasonably incurred in litigating this matter. See 42 U.S.C. § 5851(b)(2)(B)(ii).

### **A. Action to Abate Violation**

To abate the violation, Respondent shall assign Complainant to a Central Alarm Station supervisor position with a five-day work week, retroactive to the date of Mr. Angelo's reassignment in March 1999. See, e.g., Thomas v. Arizona Pub. Serv. Co., 89- ERA-19 at 13 (Sec'y Sept. 17, 1993)(ordering the respondent to retroactively promote the complainant). See also 42 U.S.C. § 5851(b)(2)(B)(ii). Respondent shall correct Complainant's personnel records to indicate said reassignment. See id. Since there is no evidence establishing that the Central Alarm Station supervisor position pays more than the shift supervisor position, no back pay shall be issued. (See, e.g., Tr. at 699.)

In addition, Respondent shall expunge Complainant's personnel file of all memoranda, reports, and references to the adverse employment actions occurring after Complainant's communication with CBS News in September or October 1997. See, e.g., McMahan v. California Water Quality Control Bd., 90-WPC-1 at 4 (Sec'y July 16, 1993). Finally, Respondent shall post on all bulletin boards of the Central Alarm Station, where Respondent's official documents are posted, a copy of the Secretary of Labor's Decision and Order for a period of sixty (60) days, ensuring that it is not altered, defaced, or covered by any other material. See, e.g., Thomas, 89-ERA-19 at 13; Smith, 93-ERA-16 at 6-7.

### **B. Compensatory Damages**

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. See Thomas, 89-ERA-19 at 14; Lederhaus v. Paschen, 91-ERA-13 at 6-7 (Sec'y Oct. 26, 1992). Where appropriate, a complainant may recover an award for emotional distress when his or her mental anguish is the "proximate result" of a respondent's unlawful discriminatory conduct. Blackburn v. Metric Constr., Inc., 86-ERA-4 (Sec'y Oct. 30, 1991). Complainant bears the burden of proving the existence and magnitude of any such injuries. See Lederhaus, 91- ERA-13 at 7. Although a complainant may strengthen his case for entitlement to compensatory damages with medical and psychiatric expert testimony, it is not required. See Thomas, 89-ERA-19 at 14; Lederhaus, 91-ERA-13 at 7. It is proper for an administrative law judge to consider the compensatory damage awards in similar cases, in arriving at his recommendation for an appropriate measure of damages. See Smith, 1993- ERA-16 at 2.

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In this case, Complainant has provided corroborating testimony to establish that his temperament and family life have been effected by Respondent's retaliatory activities. (Tr. at 635-36, 935.) In making this finding, I credit the testimony of Mrs. Graf that Complainant became "a lot grumpier" after he was placed on administrative leave. (Tr. at 935.) She explained that his mood continues to vary and that his stomach has been bothering him for the last several months. (Tr. at 936-37, 91.) Moreover, Complainant no longer discusses his problems with his wife, and his three children are less inclined to discuss their problems with him. (Tr. at 938, 940- 41.)

Nevertheless, Complainant has maintained good relationships with his children. (Tr. at 935.) Indeed, Complainant concedes that his family relationships have been strengthened through this process. (Tr. at 635. But see Tr. at 938.) For instance, Complainant was able to spend more time with his wife and children while he was on paid administrative leave. (Tr. at 936.) In addition, he continued to fly his airplane and took several trips outside of the state. (Tr. at 719, 942-43.)

I further find that Complainant's financial concerns are primarily due to the anticipated closure of RFETS, rather than Respondent's unlawful activities. As a result of a joint decision by Congress and the DOE, RFETS is scheduled to close in approximately 2006. (Tr. at 943, 1218, 1220-21.) Respondent's employees, including Complainant, have been notified that they will lose their jobs when the site closes. (Tr. at 944.) Complainant also introduced evidence to show that the opportunities for obtaining similar positions with similar salaries are extremely limited. (Tr. at 550, 640. See also Tr. at 640-41.) As such, Complainant has begun to make plans in anticipation of the site closure. (Tr. at 944. See also Tr. at 939, 1221-23, 1396-97.)

Moreover, I find little merit to the argument that Respondent's unlawful activities are responsible for Complainant's sleeping difficulties. The record indicates that Complainant's sleeping problems began in 1995, when he was assigned additional shift relief work. (Tr. at 637-38, 936.) Indeed, Complainant's sleeping difficulties began approximately two years before his protected disclosures to CBS News and the retaliatory actions that followed. (Tr. at 637- 38, 936.)

Based on the foregoing, I find that the magnitude of Complainant's mental anguish is similar to the complainant's in Blackburn, 86-ERA-4. In Blackburn, the Secretary of Labor awarded the complainant \$5,000 for mental pain and suffering caused by a discriminatory discharge. 86-ERA-4 at 1-3. Therein, it was determined that the complainant became moody, depressed, and short-tempered with his wife and children. See id. In addition, he had difficulty sleeping and experienced low self esteem. See id. It was also determined that the complainant suffered little, if any, economic harm. See id.

Likewise, I find that Complainant's emotional distress is greater than the complainant's in Thomas, 89-ERA-19. In Thomas, the Secretary of Labor awarded the complainant \$1,000 for the humiliation she experienced in having to undergo a demeaning recertification process. 89-ERA-19 at 13-15 (reducing the \$5,000 award recommended by the administrative law judge to \$1,000).

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Furthermore, I find that the severity of Complainant's emotional distress does not rise to the level of the complainants' in discriminatory discharge cases such as Lederhaus, 91-ERA-13, and McCustion, 89-ERA-6. In Lederhaus, the Secretary of Labor awarded the complainant \$10,000 for emotional distress caused by a discriminatory discharge. 89-ERA-6 at 6. Therein, the complainant experienced such mental anguish that he



contemplated suicide on at least one occasion. See id. at 8. Foreclosure proceedings were initiated on his home, bill collectors harassed him and called his wife at her job, his wife's employer threatened to lay her off, and his family life was disrupted. See id. at 6-9.

In McCuiston, the Secretary of Labor awarded \$10,000 in compensatory damages. 89-ERA-6 at 11. Therein, the complainant had been harassed, terminated, and blacklisted. The complainant forfeited his life, health, and dental insurance, and was unable to find other employment. See id. at 12-13. He also experienced physical manifestations of emotional distress. See id. at 11-13. For example, the complainant's preexisting hypertension was exacerbated to the point that he required medical treatment, medication, and emergency room admission on at least one occasion. See id. He also experienced sleeping problems, exhaustion, anxiety, and depression. See id.

In the instant case, Complainant did not experience anxiety related to economic hardship or unemployment. See, e.g., Lederhaus, 91-ERA-13; McCuiston, 89-ERA-6; Creekmore v. ABB Power Sys. Energy Serv., Inc., 93- ERA-24 (Dep. Sec'y Feb. 14, 1996)(awarding \$40,000 for emotional distress caused by discriminatory layoff); Bigham v. Guaranteed Overnight Delivery, 95-STA-37 (ARB Sept. 5, 1996)(awarding \$20,000 for emotional distress caused by discriminatory discharge.). Nor did he experience major depression or physical manifestations like the complainants' in Michaud v. BSP Transp. Inc., 95-STA-29 (ARB Oct. 9, 1997); Smith v. Littenberg, 92-ERA-52 at 4-5 (Sec'y Sept. 6, 1995); Lederhaus, 91-ERA-13; and McCuiston, 89-ERA- 6. Complainant did not have suicidal thoughts or experience daily harassment like the complainant in Smith, 93-ERA-16, and was not publicly humiliated like the complainant in Van der Meer v. Western Kentucky Univ., 95-ERA-38 (ARB Apr. 20, 1998).

Accordingly, and based on the foregoing, I conclude that a compensatory damage award of \$5,000 is consistent with previous whistleblower decisions.

### **C. Attorneys' Fees and Costs**

Complainant is also entitled to recover attorneys' fees and costs reasonably incurred in litigating this matter. See 42 U.S.C. § 5851(b)(2)(B)(ii). Hence, Complainant's counsel shall have a period of thirty days from the date of this recommended decision and order within which to file an application for attorneys' fees and costs with this office. Respondent shall have twenty days thereafter within which to file any objections.

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### **IV. RECOMMENDED ORDER**

**IT IS HEREBY RECOMMENDED** that the following **PRELIMINARY ORDER** be issued:

1. Respondent, Wackenhut Services, L.L.C., shall assign Complainant to a Central Alarm Station supervisor position with a five-day work week, retroactive



to the date of Mr. Angelo's reassignment in March 1999, and shall correct Complainant's personnel records to so reflect.

2. Respondent shall expunge Complainant's personnel file of all memoranda, reports, and references to the adverse employment actions occurring after Complainant's communication with CBS News in September or October 1997.

3. Respondent shall post on all bulletin boards of the Central Alarm Station, where Respondent's official documents are posted, a copy of the Secretary of Labor's Decision and Order for a period of sixty (60) days, ensuring that it is not altered, defaced, or covered by any other material.

4. Counsel for Complainant shall have a period of thirty (30) days from the date of this Recommended Decision and Order within which to file an application for attorneys' fees and costs with this office, and Respondent shall have twenty (20) days thereafter within which to file any objections.

**IT IS FURTHER RECOMMENDED** that the following **ORDER** be issued:

5. Respondent shall pay Complainant \$5,000.00 in compensatory damages.

Entered this 16th day of December 1999, at Long Beach, California.

**DANIEL L. STEWART**  
Administrative Law Judge

DLS:cdk

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8, 24.9, amended by 63 Fed. Reg. 6614 (1998).